(Testimony of M. H. Comstock.)

A. I was not, no, because before it was completed I was injured.

Q. You were injured before it was completed?

A. Yes.

Q. Were you there after it was completed?

A. I was there afterwards, but did no work on it.

Q. Did you see a railroad use that bridge as a railroad bridge?

A. Yes, I have been across it hundreds of times.

Q. What railroad was there?

A. It was the Southern Pacific and the Central Pacific. It was practically under the Central Pacific's control, because our Western Division had no work on it; it was all on the Sacramento Division.

Q. Did you have anything to do with the destruction or tearing down of that 1878 bridge?

A. I did not; no.

Q. Did you have anything to do with the repair of it between 1878 and 1895? A. I did not.

Mr. HALL.—That is all. [76]

Cross-examination.

Mr. FORD.—Q. Mr. Comstock, you say you were there when they were driving piling for this 1878 bridge? A. I was.

Q. You had been there before that, had you not?

A. I had been before that there, yes.

Q. And seen trains operating over the other bridge? A. I did, yes.

Q. Where was this bridge over which the trains were being operated before the 1878 bridge, located,

(Testimony of M. H. Comstock.)

with reference to the 1878 bridge, above it or below it? A. Below it.

Q. How far below it?

A. Probably somewhere in the neighborhood of 25 or 30 feet; there was just the piers—the point of the piers were very close together; it was built as close as we could build it and have a clearance.

Q. This bridge prior to the 1878 bridge, did the trains and wagons run over the same bridge?

A. They did.

Q. Over the same part of the bridge, or were there two decks to it?

A. No, just a single bridge.

Q. How long a time had you known of the trains running over there?

A. That was not very long, because I only started to work with them in 1877.

Q. How long had the trains been running over there in 1878 when you were there—did you live in that neighborhood?

A. No, I lived here in Oakland.

Q. Had you ever been up to Sacramento before that?

A. Yes, I had been up to Sacramento.

Q. Have you any idea when the trains started running over that wagon bridge?

A. No, I don't know anything about it at all.

Q. When was the first time, so far as you remember, of seeing a train run over there?

A. The first time I came out here— when I first came out here I took the boat from Sacramento to

(Testimony of M. H. Comstock.)

San Francisco; I did not go over the bridge at all. [77]

Q. When did you come here?

A. I came here in the spring of 1877.

Q. Now, with reference to these companies which you say operated trains over there, there was the Central Pacific Railway Company, there was the Central Pacific Railroad Company, the Southern Pacific Railroad Company, the Southern Pacific Company, the California Pacific Railroad Company, the California Pacific Railroad Expension Company?

A. I don't know anything about them.

Q. What I want to get at is, you don't know which company operated these trains, do you?

A. I do not; no.

Q. Mr. Hall had you say that you did.

A. The only thing I know is that road was called the California Pacific, and that is all I know; we did not hear much of the Southern Pacific at that time, 1877, 1878; it was Central Pacific; practically all the Southern Pacific lines have been built since that time.

Q. You understand, don't you, the Southern Pacific Company is an operating company?

A. Certainly I do now.

Q. It does not own railroads, ordinarily?

A. No.

Q. Simply leases. Now, then, having in mind what you said a while ago about the Central Pacific operating the road, do you know of your own

(Testimony of M. H. Comstock.)

knowledge whether the Central Pacific ever operated any train over there?

A. No, I could not swear to that.

Q. Do you know of your own knowledge whether the Southern Pacific ever operated any train over the 1869 bridge, the bridge there prior to the 1878 bridge?

A. No, I could not say.

Q. Do you know of your own knowledge whether the Southern Pacific Company operated any trains over the 1878 bridge?

A. There were trains going over and back; you could call them Southern Pacific.

Q. That is, you don't know which company was operating them?

A. I don't know anything about that business at all.

Redirect Examination.

Mr. HALL.—Q. Did you ever see any marks or names on the engines and cars of the railroad trains? A. I did.

Q. What names did you see?

A. I saw Southern Pacific and Central Pacific. [78]

Q. You say Southern Pacific and Central Pacific trains going over them?

A. I have seen the engines.

Recross-examination.

Mr. FORD.—Q. Did you ever look at the freight trains and see the names on the cars, and so on?

A. I have often.

(Testimony of M. H. Comstock.)

Q. You find the names of almost every railroad in the United States on them, don't you?

A. Yes, that is true.

Mr. FORD.—I think, your Honor, that there will be no dispute about the matter after I check it up.

The COURT.—I imagine more specific testimony than this as to who was operating the road can be offered.

Mr. HALL.—Q. Did you destroy or help destroy the 1869 bridge? A. I did not.

Q. Mr. FORD.—Q. What was the 1869 bridge?

Mr. HALL.—The bridge that was repaired in 1869, I mean. That is all.

Testimony of George Dickson, for Libelant.

GEORGE DICKSON, called for the libelant, sworn.

Mr. HALL.—Q. What is your full name?

A. George Dickson.

Q. What is your occupation, Mr. Dickson?

A. I am running a dredger, captain of a dredger.

Q. How long have you been engaged in that business? A. About 13 years.

Q. Did you ever work on the construction or destruction of any bridges over the river at Sacramento?

A. I did, yes; I worked on the construction of that bridge before this present one.

Q. The 1895 bridge?

A. The 1895 bridge, I worked on that.

(Testimony of George Dickson.)

Q. Who were you working for?

A. For McKeon.

Q. What company, if any?

A. The Southern Pacific Company.

Q. Were you present there when the old bridge was torn down? A. No.

Q. Was the old bridge in operation while you were erecting the 1895 bridge?

A. Yes, in operation. [79]

Q. How far up the river was it from the 1895 bridge?

A. I should judge 400 or 500 feet.

Q. Were there trains running over it at that time? A. Yes.

Q. I believe you said you had nothing to do with the destroying of the old bridge there in 1895.

A. Nothing at all to do with the destroying of the old bridge.

Q. Were you there during the time it was being destroyed? A. No.

Mr. HALL.—That is all.

Cross-examination.

Mr. FORD.—Q. The bridge you worked on was what? A. The 1895 bridge.

Q. The bridge down opposite Harriet Street, Washington, that is the one? A. Yes.

Q. And afterwards, when you were working on the 1905 bridge, there was a bridge about 400 or 500 feet upstream? A. Upstream, yes.

Q. That was in use while you were making the 1895 bridge? A. Yes.

(Testimony of George Dickson.)

Q. You saw trains running over the bridge up there opposite Ann Street—you are acquainted with the streets, are you not?

A. No, not very well.

Q. Ann over in Washington? A. Yes.

Q. Do you know Ann Street? A. Yes.

Q. This bridge you speak of as being 400 or 500 feet upstream from the 1895 bridge was about opposite Ann Street, was it?

A. Yes, somewhere up in that location.

Q. And ran directly into the depot at Sacramento? A. Yes.

Q. That is, without any turn in the tract?

A. A straight track right through.

Q. The bridge you worked on they had to turn to go into the depot? A. Yes.

Mr. FORD.—That is all.

Mr. HALL.—That is all. [80]

Testimony of Charles R. Hall, for Libelant.

CHARLES R. HALL, called for the libelant, sworn.

Mr. HALL.—Q. Your name is Charles R. Hall?

A. Yes.

Q. What is your occupation?

A. Civil engineer.

Q. You are employed by whom?

A. At this time I am employed by the Ajax Dredging Company.

Q. The Ajax Dredging Company is allied to the libelant, the Olympic Dredging Company, is it not?

(Testimony of Charles R. Hall.)

A. Yes.

Q. Practically the same corporation, or the same stockholders? A. Yes.

Q. Were you ever employed by the Government of the United States?

A. Yes, I was connected with the War Department and Engineering Department.

Q. How long were you connected with the Engineering Department and War Department?

A. About 20 years.

Q. In what capacity?

A. As assistant engineer; for the last ten years of that time I was assistant engineer.

Q, Were you employed in the Government service during the year 1918? A. Yes.

Q. Where were you stationed?

A. Sacramento.

Q. Do you remember of the dredger "Thor" having been wrecked upon some piling in the Sacramento River in July, 1918? A. Yes.

Q. Did you see her while she was down on the piles? A. I did.

Q. Did your duties require you to make any investigation and examination of the condition of the river there at that time? A. Yes.

Q. What examination did you cause to be made?

A. Well, at the time the "Thor" went down, I instructed my survey party to go to the site and make a survey and locate the vessel as she lay in the stream. [81]

Q. Was that done? A. That was done.

(Testimony of Charles R. Hall.)

Q. Have you the result of that survey?

A. Yes.

Q. Have you the original records that were made a part of the Government files at that time?

A. I have the original map that was prepared and sent to the office at San Francisco.

Q. Have you the original notes of the survey?

A. I have not the original notes of the location of the "Thor."

Q. Have you any notes of the location of the "Thor" that were made as a result of that survey?

A. I have the notes of the location of piles that were found in the stream after the "Thor" had been removed.

Q. Was a plat of the location of the "Thor" made a part of the public records of that engineering office at that time? A. It was.

Q. Have you that original plat?

Mr. FORD.—I would like to cross-examine, your Honor, on that.

The COURT.—Yes.

Mr. FORD.—Q. What public office do you refer to, that this was made a part of?

A. The United States Engineering Office of the Third San Francisco District.

Q. Where is that located?

A. It was located in the Custom House until very recently; they have moved to Montgomery Street, next to the Mills Building.

Q. From what source did you derive the knowl-

(Testimony of Charles R. Hall.)

edge that these matters were made a public record there?

A. I was their representative in charge of the engineering office in Sacramento; I was their personal representative, official representative.

Q. I understand now, then, certain reports were made to you, were they?

A. My men in Sacramento were instructed to make a survey, which was made under my supervision, although I actually did not measure, hold the tape, or anything of that sort.

Q. What did they do with their notes, or whatever you call their survey?

A. They reported to the Sacramento office and I directed the draftsmen in the Sacramento Office to make a map or [82] plot of this survey, and that plot was made and it was submitted to the main office in San Francisco over my signature.

Q. How was it submitted, sent by mail, or how?

A. By mail.

Q. Did you afterwards see it in the main office in San Francisco? A. Yes.

Mr. FORD.—I am not acquainted myself with the rule concerning matters of this kind, whether that is all the proof that has to be made or not; it seems to me that unless there is some statute directly upon the subject it is not the best evidence.

Mr. HALL.—The record of a regularly established department, I assume that the Court will take judicial cognizance of.

The COURT.—Unless it is a record pursuant to

(Testimony of Charles R. Hall.)

law, I do not know whether it is entitled to any weight or not.

Mr. FORD.—May I make a formal objection that it is immaterial, irrelevant and incompetent, hearsay, and not the best evidence, and I will look it up in the meantime.

The COURT.—I will reserve my ruling, but that is my impression of it at the present time, that unless the record is kept pursuant to law it is not even *prima facie* evidence.

Mr. FORD.—You understand, it may be I will withdraw my objection, but I am in a situation here in the dark, so I don't know what these gentlemen are going to hand me.

The COURT.—Yes, I realize that.

Mr. HALL.—I do not think we are going to hand you gentlemen anything.

Mr. FORD.—It might be that I would want to question these surveyors, and the production of their original notes might give me some information.

The COURT.—Proceed.

Mr. HALL.—Q. Mr. Hall, did you file or transmit that plat from the Sacramento office to the head office of the Engineering Department in San Francisco pursuant to any regulations, or instructions, or directions?

A. Pursuant to the instructions of the chief in the office, chief of the district, the Third [83] Engineering District.

Q. What was your purpose in making that sur-

(Testimony of Charles R. Hall.)

vey as a Government engineer?

A. Well, my duties as a Government engineer required me to make such surveys and locate obstructions in the Sacramento River.

Q. You did that, and this work was done pursuant to such instructions, and the plat made and transmitted to this office? A. Yes.

Mr. HALL.—We desire to offer in evidence the plat.

The COURT.—I will admit it subject to the objection.

Mr. HALL.—I have here the original plat, it is a blue-print, but I have another one—Colonel Rand very kindly loaned this to me with strict instructions that it should not go into evidence. Of course, I recognize he could not keep it out if I wanted to offer it in evidence, but we have a blue-print copy of it.

Q. Colonel Rand is the engineer in charge of this engineering district for the United States, is he not? A. Yes.

Mr. FORD.—The trouble of it is this diagram locates the "Thor" here; the witness says he only had the piles located.

Mr. HALL.—No, he says he has only the notes of the survey of the piles which were made on October 2d, and this is the "Thor" survey that was made while the boat was there.

Mr. FORD.—It seems to me certainly if they are going to locate the "Thor" on a map under such a theory as Mr. Hall has presented here, that

(Testimony of Charles R. Hall.)

a defendant would be in rather a perilous situation—

The COURT.—I think it is clearly incompetent so far as the location of the boats is concerned, because that was not part of the duties of the office at all. It was their duty to locate obstructions, but not the boat.

Mr. HALL.—But the boat was then down upon some obstruction. Let me ask the witness a question. [84]

Q. Was it a part of your duties, when a boat was sunk in the river, or any channel along there, to make a survey and location of the boat or vessel itself while it was there?

A. The only possible way when a vessel was on an obstruction was to locate the vessel itself and then locate the obstruction, or the piles, or whatever it may have been, from that.

Q. Was that your reason for making this location of the "Thor"?

A. That was the reason. The location of the hull of the "Thor" was the basis from which the piles were located.

The COURT.—I presume it would not be very difficult to locate it in any event. That was only a year or so ago.

Mr. FORD.—The only reason I make the objection is I would like to have some person actually locate it.

Mr. HALL.—I would have gotten him, if I could, but this is the best evidence I could get.

(Testimony of Charles R. Hall.)

Mr. FORD.—Then I am certainly not satisfied with that being the best evidence. Colonel Rand has been very active in this matter, and I take it he is unprejudiced. These matters were located through some instructions from Colonel Rand, and I cannot see myself, why we should resort to secondary evidence in a matter of this kind.

The COURT.—You can reserve your rights under the objection.

Mr. HALL.—I have called on Colonel Rand for all of these things. Have you the blue-print map?

A. Yes.

The COURT.—That corresponds to the location on the other blue-print, does it not?

Mr. HALL.—Yes.

The COURT.—This was copied from the other?

Mr. HALL.—Yes.

The COURT.—If that is true, it will not be necessary to put the other in evidence.

Mr. HALL.—The only thing is I wanted to make it a part of the evidence. [85]

(The blue-print is marked Libelant's Exhibit 9, and the original contains the following endorsement: "File copy. U. S. Engr. Dept., 405 Custom House, San Francisco. Doc. S. F. 26–112. File 6. Div. 6, Sheet 267–B.")

Q. Have you, in your possession, any survey of the piles that were in the river there approximately where the "Thor" went down?

A. Subsequent to the time that the "Thor" went down, after she was removed, I gave instructions

(Testimony of Charles R. Hall.)

to a survey party to locate any obstructions that they could find in that immediate vicinity.

Q. Have you the result of that survey and that work? A. Yes.

Q. Have you the notes of that survey? A. Yes.

Q. May I see them? A. Yes.

Q. Are these the original notes, which you now hand me, which were filed in the Engineer's Office in Sacramento, and transmitted to the office in San Francisco?

A. Yes. I do not think those original notes were transmitted to San Francisco, but the plat made from those notes was; that is here.

Q. Where were these original notes kept?

A. They were kept in the office at Sacramento.

The COURT.—They are the original notes, however?

Mr. HALL.—They are the original notes, however.

A. They are the original notes.

Mr. FORD.—May these go in subject to the same objection?

The COURT.—Yes.

Mr. HALL.—I have no copy of these. May I withdraw these and leave a photostatic copy, because these are original files of the War Department.

The COURT.—Yes, or you can have them copied into the record.

Mr. HALL.—I will give them to the stenographer and ask to have copies made and put into the record.

(Testimony of Charles R. Hall.)

Q. Have you a plat that was made of this obstruction in the river as a result of this examination? A. Yes.

Q. Will you produce it? A. Yes.

Q. You may state to the Court when the examination was made of [86] the location of these piles.

A. August 2, 1918.

Q. Mr. Hall, referring to the last blue-print which you have described, and the blue-print on the blackboard, which has been marked Exhibit 2B, are the piles which are shown upon the last exhibit in the same position on Exhibit 2B?

Mr. FORD.—Do I understand the witness is just determining that now, or is he familiar with the map already.

Mr. HALL.—He is familiar with the map already.

A. They are approximately in the same place.

Q. Approximately; do they vary any?

A. Not materially.

Mr. HALL.—We offer the plat last identified by the witness in evidence as Libelant's Exhibit 10.

Mr. FORD.—The same objection as heretofore.

The COURT.—The same reservation of ruling.

(The blue-print is marked Libelant's Exhibit 10, and contains the following endorsement: "U. S. Eng. Dept., 405 Custom House, San Francisco, Dec. S. F. 26-112, File 6, Div. 2, Sheet 267-A, File Copy.")

Mr. HALL.—That is all.

(Testimony of Charles R. Hall.)

Cross-examination.

Mr. FORD.—Q. Starting in at the first, how did you arrive at this conclusion that this—

Mr. HALL.—May the record show that we offered that plat in evidence and we want to withdraw it under the same condition; we have not yet a copy of this.

The COURT.—Yes.

Mr. FORD.—Q. How did you arrive at the conclusion that the piles shown here on Exhibit 2A within the parallelogram marked "Thor" are approximately the same as the piles on Exhibit 10, the diagram just last shown you—how did you arrive at the conclusion they are the same?

A. They correspond when they are put together. On this record there are piles indicated outside of this line, outside of the position of the "Thor"; they show approximately piles that are shown there, as well as those outside there. [87]

Q. For instance, this cluster of piles shown within the parallelogram on Exhibit "AA," where do you find those on the diagram just shown you?

A. Here at these two points.

Q. Corresponding to what two points?

A. Up in there.

Mr. HALL.—Q. Up in the bow of the "Thor"?

A. The bow of the "Thor," yes.

Mr. FORD.—Q. And the piling shown on the lower part of the diagram?

A. The piling shown on the lower part of the diagram—I can't say as to that.

(Testimony of Charles R. Hall.)

Mr. FORD.—Have you a photographic copy of the blue-print?

Mr. HALL.—No, I have not.

The COURT.—Is all the piling shown on Exhibit 2A shown on that one also, or does this last one show more?

Mr. FORD.—I cannot see any similarity between the situation, myself.

A. After the "Thor" was removed, these men were instructed to go down there and locate any obstructions they could find, and they went in a boat and sounded, and when they struck an obstruction they then measured where that was, and how deep it was below the water, and it was indicated on here.

Q. You mean piling, by obstruction?

A. I mean it might have been piling—it might have been other matters; probably piling.

Q. Do these indicate piling?

A. These indicate piling; these indicate the points at which they found obstructions. The "Thor" was located in here. The piling had been cut off to permit the "Thor" to be moved; the piling over here was outside of the line of the "Thor"; in other words, there was piling still there that the "Thor" did not touch; in other words, this shows all the obstructions that were found by that survey party.

Mr. FORD.—I want the witness to mark the outline of the "Thor" on the little diagram, because I have got to have some engineer advise me; I am

(Testimony of Charles R. Hall.)

not enough of an engineer.

Mr. HALL.—Use this map to mark it.

Mr. FORD.—I want you to mark with a pencil the "Thor" on [88] this large diagram, Exhibit 10. A. Very well.

The COURT.—Can you proceed with something else while the witness is doing it?

Mr. FORD.—Yes.

The COURT.—Can you call another witness, Mr. Hall?

Mr. HALL.—Yes.

(Thereupon the witness was temporarily withdrawn.)

Testimony of J. Kagee, for Libelant.

J. KAGEE, called for the libelant, sworn.

Mr. HALL.—Q. Captain, what is your occupation? A. Dredger captain.

Q. How long have you been engaged in that work? A. Over two years.

Q. Were you ever captain of the "Thor"?

A. Yes.

Q. When did you commence to be captain of the "Thor"? A. Two years ago last October.

Q. Where was she at that time?

A. Rio Vista.

Q. Were you on the "Thor" and in charge of her on July 13, 1918? A. Yes.

Q. Where were you working?

A. We were working about a mile above the Sacramento River bridge.

(Testimony of J. Kagee.)

Q. Did you receive any instructions or orders from anyone to move the "Thor" that day?

A. Yes.

Q. From whom did you receive such instructions? A. From Mr. Hall.

Q. Mr. Charles R. Hall?? A. Yes.

Q. Do you know what contract you were working on at that time?

A. Well, we were digging out the channel for the Government.

Q. For the Government? A. Yes.

Q. What instructions did Mr. Hall give you in regard to the "Thor" and her movement, if any?

A. He told me to move the "Thor" below the bridge and dig out for the Sacramento waterworks.

Q. The "Thor" is what is known as a clamshell dredger, is she not? A. Yes.

Q. How long is she? A. 120 feet long.

Q. How wide? A. Fifty-eight feet. [89]

Q. How deep is her hull? A. 10 feet.

Q. How much water does she ordinarily draw?

A. Between 5 and 6 feet.

Q. Had you gone up the river through the drawbridge at any time prior to July 13? A. Yes.

Q. How long had you been up there?

A. About a month.

Q. Will you tell the Court in your own way what you did after you received the instructions from Mr. Hall in regard to the moving of the "Thor"?

(Testimony of J. Kagee.)

A. Well, he ordered us to move down there, to dig out for the Sacramento waterworks, and we started to move down, and we got stuck a little ways above the bridge, waiting for the tide; then we moved down from the bridge to, well, above the bridge, and we blew a whistle for them to open the span, and we started to drift through, and the leverman was on watch, he was handling the dredge, and I went inside, and when I came out the dredge was stopped; and he started to swing the bucket or something to move the machine, and I noticed she was listed, and I looked down in the hold and there was water there, probably a foot of water on the floor already, and she was sinking then already; then I hollered to him and he dropped the bucket and came down, and that is all I know about it, as far as stopping, or anything of that kind.

Q. How were you proceeding down the river?

A. We were just drifting down.

Q. Just drifting down? A. Yes.

Q. The "Thor" was a vessel wit[illegible] rudder or propeller, was she? A. Yes.

Q. How do you usually, and how do captains in charge of such dredgers, usually take them downstream?

A. Well, we handle them with the boom and the bucket.

Q. Is that a safe and seamanlike manner in which to handle the dredge?

A. We always handle them that way.

(Testimony of J. Kagee.)

Mr. FORD.—Just a minute. Will the answer go out?

The COURT.—Yes, if you desire to object. [90]

Mr. FORD.—My objection is that the witness is not permitted to give his conclusion that a matter is safe; he might state whether that is the usual practice, but I do not understand the witness can say this is safe, or that is safe.

The COURT.—He can state what is the usual practice.

Mr. HALL.—What is the usual practice?

A. That is the usual practice.

Q. In your opinion as a man who has been captain and handler of dredges, is that a careful and prudent manner in which to move a dredge downstream?

Mr. FORD.—The same objection.

The COURT.—He may answer.

A. Yes.

Mr. HALL.—Q. How long was the "Thor" on the piles there?

A. Well, she was there about two weeks.

Q. Did you see any of the actual piles sticking through the bottom of the boat, or who handled that matter? A. No, I did not see that.

Q. What time of the night was it when the "Thor" went on?

A. A little after twelve o'clock.

Q. A little after twelve? A. Yes.

Q. What did you do immediately after you found that the bottom was injured and that the hold was

(Testimony of J. Kagee.)

being filled with water?

A. We just stopped the bucket right there.

Q. Did you do anything with the machinery, or boilers, or the fires, or anything?

A. Yes, we put out the fires, to make things safe.

Q. Did you go with the "Thor" after she was raised, to the drydock? A. Yes.

Q. Did you make an examination of her hold after you reached the drydock? A. Yes.

Q. And her bottom? A. Yes.

Q. Tell the Court what you found, if anything.

Q. Well, it showed where she was punctured, and where the divers had patched [91] her up.

Q. Where were the punctures in the bottom of the boat?

A. They were in the front part, two of them, and one on the side, and one right in the middle.

Q. How large a hole was the one in front?

A. It was a big hole.

Q. Where was it with reference to the hatch?

A. Right under the hatch.

Q. Can you give the Court some idea of the dimensions of the hole under the hatch?

A. Well, they tore off some stuff off the bottom; there was 12 piles through there.

Q. There were twelve piles through that hole?

A. Yes.

Mr. FORD.—The witness has said he did not see the piling, hasn't he?

The COURT.—Q. Was that of your own per-

(Testimony of J. Kagee.)

sonal knowledge, or were you told that?

A. No, I was there when they were sawed off.

Mr. HALL.—You saw them sawed off and come up out of that hole? A. Yes.

Mr. FORD.—The reason I made the suggestion is the witness said he did not see the piling sticking through the bottom of that hull.

The COURT.—You saw them later, did you?

A. Yes.

Mr. HALL.—Q. Did you see any of the other piling?

Mr. FORD.—Let me ask a question. The witness has said that he saw this with his eyes. Now, this piling, if it was under the water, I don't know whether he did or not.

The COURT.—You may interrogate him about that.

Mr. FORD.—Q. Were these piles covered with water? A. Yes.

Q. How high was the water over the piling?

A. I could not say that.

Q. Would you say an inch, or a foot, or two or three feet?

A. More than that; I don't know how much, though.

Q. How far would you think?

A. Well, the dredger was sunk, there was four or five feet of water in her hold. Of course I could not see them then. When they were sawed off and [92] brought on deck I saw them.

Mr. HALL.—Q. They were sawed off and

(Testimony of J. Kagee.)

brought on deck? A. Yes.

Mr. FORD.—Q. You saw them come out of the water afterwards? A. Yes.

Mr. HALL.—Q. They were brought up and put on the deck of the "Thor"? A. Yes.

Q. Had you been going up and down the river there some time prior to July 13, 1918?

A. No, not that year.

Q. You had gone up there that year, had you not, with the "Thor"?

A. Before, yes, when we went up to do the job.

Q. How long before the 13th of July was it that you went up there?

A. We went up there in June.

The COURT.—About a month, he said a while ago.

Mr. HALL.—Q. About a month before?

A. Yes.

Q. Had you at any time during that month seen those piles that you ran on to? A. No.

Q. Did you know they were there? A. No.

Q. Had you received any information or intimation that led you to believe there was any obstruction in the channel there at that time?

A. No.

Mr. HALL.—You may cross-examine.

Cross-examination.

Mr. FORD.—Q. Captain, you say you had no information that those piles were there?

A. Yes.

Q. Were you acquainted with the channel of the

(Testimony of J. Kagee.)

Sacramento River? A. Yes.

Q. How long have you been a boat captain?

A. A little over two years.

Q. How does a boat captain ascertain the locality of obstructions? I don't know, you understand.

A. I don't know what you mean.

Q. How would you know where there is danger to navigation in the river?

The COURT.—Would you go by chart, or something?

A. No, just by moving up and down. [93]

Mr. FORD.—You take a long chance?

A. Yes.

Q. Do I understand you that these boats going up and down the Sacramento River have no way of knowing?

A. A dredger never has any charts or anything to go by, and they just move around.

Q. You are a river captain, are you not?

A. No, I am a dredger captain.

Q. Doesn't a dredger captain have to inform himself concerning the channel in which he is working? A. We have to find it ourselves.

Q. Do you understand that these other boats, these captains of the steamers going up the Sacramento River have no means, except to find out for themselves?

A. We have to find a channel; we always learn it by going up and down it.

Q. Does not the Government have any plat or any information for you? A. None at all.

(Testimony of J. Kagee.)

Q. So if you should be elected captain of one of these steamers running between here and Sacramento, you would be in the same position as any other captain, just take the boat up and take a chance. Is that it?

Mr. HALL.—This man has not a master's license to navigate a boat of that sort up and down the river; he is only a dredger captain.

Mr. FORD.—I don't know anything about it.

The COURT.—I suppose the obstructions are shown on some map or plat of some kind.

Mr. FORD.—That is what I am trying to get at.

Mr. HALL.—He said he had nothing of that kind.

Mr. FORD.—Q. Do you know whether there is any plat or map furnished to these river boat captains, or anyone plying that river, that would warn them of the location of dangers to boats?

A. There may be on the steamers, but not on the dredgers.

The COURT.—Apparently they did not know anything of this until after the accident.

Mr. FORD.—It would seem very odd if they did not. [94]

The COURT.—That is the fact, according to the testimony of the witness.

Mr. FORD.—Q. You say you were there during the time the work was being done on the "Thor" to raise it? A. Yes.

Q. How was the river level at that time, the water level, was it low or high?

(Testimony of J. Kagee.)

A. The river was low.

Q. Do you know what the level was on July 13th?

A. No, I don't know anything about that.

Q. How was it as compared with the month before when you had gone up?

A. The river was falling all the time.

Q. You did not see with your own eyes any piling extending through the bottom of the "Thor," did you? A. No.

Q. All you know was that you saw parts of piling after it was sawed off and brought up?

A. Yes.

Q. You say there were twelve in one place?

A. That is what the diver said.

Q. How do you know there were twelve, except just what the diver told you?

A. They were brought on deck.

Q. You don't know whether they came from one place, do you?

A. They were working in one place at a time.

Q. Could you see them working down there?

A. Sure.

Q. Could you see the piles down there they were working on? A. No, you could see the diver.

Q. But you could not see the piles? A. No.

Q. Did they work on more than one place?

A. They did afterwards.

Q. Now, this place where the twelve were was under what part of the boat?

A. Right under the hatch.

The COURT.—That is in front?

(Testimony of J. Kagee.)

A. That is in front.

Mr. FORD.—Q. Were there any other punctures in the front except at that one place where the twelve were?

A. There was one on the rake.

Q. What is the rake?

A. The rake of the dredger.

Q. The slant? A. Yes, the slant.

Q. Was that nearer the front than the place where the twelve piles had come through?

A. Yes, nearer the front. [95]

Q. What other place?

A. There was one on the starboard side.

Q. Which is that, the right or left?

A. That is the Sacramento side, the right side.

Mr. HALL.—You might explain; the bow of the boat was upstream? A. Was upstream.

Mr. FORD.—In addition to the place where the twelve piles had punctured, there was a puncture to the right of the place where the twelve piles had gone through? A. Yes.

Q. Any puncture to the left of the place where the twelve piles had gone through?

A. Yes, there was one to the left, further back.

Q. How far back towards the rear end of the boat were there any punctures?

A. About the middle of the dredger.

Q. How many piles had gone through there?

A. Well, I don't know just how many there were through there; there were three or four there, I guess.

(Testimony of J. Kagee.)

Q. Did your dredge go clear down below the water in sinking, or did it remain on top of the water? A. It went down to the bottom.

Q. It went down to the bottom of the river?

A. Yes.

Q. So it struck the river-bed? A. Yes.

Q. Did the river cover the top of it at that time?

A. No.

Q. How much of the dredger was out of water?

A. Just the deck on one side.

Q. It was up to the deck on one side?

A. Yes.

Q. How about the other side?

A. She was listed and it was not quite up on the other side.

Q. You say that your deck was ten feet above the bottom? A. The hull was ten feet deep.

Q. How far above the bottom of the "Thor" was the deck, about?

A. Ten feet; the hull was ten feet deep.

Q. So that at that place that listed to one side, the water was practically up to the deck?

A. On one side.

Q. On the lower side?

A. On the lower side. [96]

Q. So the water was how deep there at that point, about ten feet? A. Yes.

Q. On the other side, how deep was the water?

A. It was probably six or seven feet.

Q. Did any of this piling coming up through the deck of your boat? A. No.

(Testimony of J. Kagee.)

Q. Or up to the deck? A. No.

Q. There was no damage, except to the bottom of the boat? A. To the bottom of the boat.

Q. Do you know how near any of the piling came up, how far any of the piling went through the boat—you did not see it yourself?

A. No, I did not see it.

Q. You don't know? A. No.

The COURT.—How long were the pieces they sawed off? A. Some were four or five feet.

Mr. FORD.—Were they different lengths?

A. Yes; that is according to how the divers sawed them off.

Q. These twelve, this big cluster, do you remember about how long they were?

A. They were all lengths.

Q. They were different lengths?

A. That is acording to how the divers sawed them off down there.

Q. What is your recollection of the length, about, of that cluster of piles, that is, the sawed off part?

A. I don't know, four or five feet.

Q. Now, were there any other piles longer than those? A. There were on the side; two on the side were.

Q. Which side? A. On the starboard side.

Q. The Sacramento side?

A. The Sacramento side.

Q. The two there were longer; how much longer?

A. They were about a foot longer.

(Testimony of J. Kagee.)

Q. Do you remember now about the piling toward the rear of the boat?

A. No, I don't know anything about that.

Q. You don't remember anything about the length of those? A. No. [97]

Q. Were you out in the stream or otherwise at the time you ran onto this piling?

A. How do you mean "out in the stream"?

Q. Were you out in the regular channel, the traveled channel of the river?

A. Yes, right in the channel.

Q. The part of the river that boats ordinarily would take? A. Yes.

Q. Did I understand you, then, that that point—how were you, in the middle of the channel, or to the side of it?

A. We were in the channel, as near as we could be.

Q. Do I understand the deepest water at that point was about ten feet deep?

A. Ten feet right there.

Q. Over to the side of your boat it was only about six feet? A. On one side.

Q. Did you take any measurements yourself after the "Thor" was raised, as to the exact location of these punctures? A. No.

Q. You say the bottom of the boat had been torn out, so that you could not tell just where the punctures had been, anyway?

A. Well, only where the patches were put on that the divers put on—the divers put a patch on.

(Testimony of J. Kagee.)

Q. It depended on how much of the flooring the divers had torn out? A. Yes.

Mr. FORD.—That is all.

Redirect Examination.

Mr. HALL.—Q. Was either depth of water you mentioned, either six or ten feet, sufficient to navigate the "Thor" at that place? A. Yes.

Q. You spoke on cross-examination of some puncture that was on the starboard side, or the side next toward Sacramento, just outside of the hull of the boat? A. Yes.

Q. Did you see these piles when they were cut off? A. Yes.

Q. How many of those were there?

A. There were two square piles.

Q. Two square piles? A. Yes.

Q. What was the character of the other piling that you saw brought up on deck that had been sawed off by the divers?

A. They were round. [98]

Q. They were round piles? A. Yes.

Q. You followed, I believe, the boat to the drydock—you went on her to the drydock? A. Yes.

Q. Did you see the holes in the bottom after she was on the drydock? A. Yes.

Q. They were then as you have now described them? A. Yes.

Recross-examination.

Mr. FORD.—Q. Mr. Kagee, did I understand you, when the boat got to the drydock these punc-

(Testimony of J. Kagee.)

tures made by the plies showed there, or had the bottom of the boat been temporarily patched up by the divers?

A. It had been temporarily patched up by the divers.

The COURT.—The patches were there?

A. We had to do that.

Mr. FORD.—Q. Was a part of the bottom there that was still punctured so that you could see the location of the punctures? A. Yes.

Q. They had not torn out the bottom of the boat, the old material was still there? A. Some of it.

Q. This piling that you mentioned on the starboard side, the Sacramento side, you say those were square? A. Yes.

Q. Did they puncture the bottom of the boat?

A. Yes.

Q. You say all the other piling except those two were round?

A. They were round; as far as I know they were round.

Q. You noticed other piling around in the same locality there, did you, at the time?

A. You mean on the other side of the piling?

Q. Over toward the Sacramento side?

A. Well, there was piling that ran up the bank there.

Q. It showed there through? A. Yes.

Q. Was there any other piling near your boat anywhere that showed? A. No. [99]

(Testimony of J. Kagee.)

The COURT.—Q. What was the condition of the upper end of this piling?

A. They looked like they had been blown off, or something; they were ragged and rough.

Redirect Examination.

Mr. HALL.—Q. They were not piling that were square across at the top?

A. Some might have been, but most of them looked like they had been blowed off, ragged, torn and splintered.

Q. About what were the dimensions of those two square piling that were on the starboard side, just opposite the hull of the boat?

A. I guess they were about 12 or 14 inches.

Q. Square? A. Square.

Q. The repairs that the divers put in were merely patches over the floor and inside the hull?

A. Inside of the hull.

Q. There was a cofferdam, was there not, over one puncture, near the rake?

A. There was a cofferdam over that puncture near the rake.

Q. That was built up inside? A. Yes.

Q. You floated her off by means of that coffer dam, off of that piling? A. Yes.

Testimony of Charles R. Hall, for Libelant (Recalled).

CHARLES R. HALL, cross-examination (resumed).

Mr. FORD.—Q. Have you made the mark which I asked you to make?

A. I have sketched the location on the "Thor" from the other plat; I have taken the record on the other plat and applied it to this plat.

Q. The plat on the board there, 2A?

A. That is a copy of the other plat, too, the little plat.

Mr. HALL.—Q. The one which we produced from the Government office?

A. The one which we produced.

from the Government office, yes.

Mr. FORD.—Q. This coincides with the position as shown on No. 2A—it shows the same number of piling at the end, does it? [100]

A. I don't know as to that. You understand this is the location of the piling that was found after the boat went away; you will note some of the elevations on the piling are below the bottom of the "Thor," so they would not show that.

Mr. HALL.—I have explained to counsel that the large rings in which there are some letters and figures are not the cribs of piling, but they are merely the legends with the arrow pointing to the crib close by.

Mr. FORD.—Do I understand that some other

(Testimony of Charles R. Hall.)

witness will be produced that will give these measurements that are shown on the diagram, the length of the piling, and so on?

Mr. HALL.—I have the divers here.

Mr. FORD.—There is no use in my questioning this witness about this, then.

Q. You say you were not down on the "Thor." You saw it there in the river?

A. I was on the "Thor" every day for a week or more while they were endeavoring to raise it.

Q. You were right on the "Thor"?

A. Yes.

Q. Did you take any measurements or observations as to its location there?

A. Observations, yes; I did not take actual measurements.

Q. Some of your men took the actual measurements?

A. I instructed my men to take the actual measurements.

Q. I notice on one of the reports you produced here some names. Are those the names of the men that did the work?

A. On the notes, yes.

Q. Are those men still in your employ?

A. Not in my employ; I am not in the Government's employ now; I think they are in the employ of the Government; I am not sure about that, though. One is not. [101]

Q. I notice at the head of the notes the names are Wilcox and Harden.

(Testimony of Charles R. Hall.)

A. Mr. Harden is the man who likely made the measurements.

Q. Mr. Harden actually made the measurements?

A. Yes.

Q. Who assisted him?

A. I don't recall now. We did not keep the names of them.

Q. It says here, "Chief of party, R. C. Wilcox."

A. Mr. Wilcox was the draftsman in the office, and he was down with that party.

Q. Do you know if he is still there?

A. I think he is.

Q. What about Mr. Harden?

A. Mr. Harden, I think Mr. Hall located him somewhere else.

Mr. HALL.—I tried to locate him yesterday, and was not able to locate him.

Mr. FORD.—I understand you are not now a Government employee?

A. I am not.

Q. Where are you located now?

A. I am working for the Olympian Dredging Company.

Q. You were not working for them at that time, though? A. No, I was with the Government.

Q. Any boat that would strike a snag anywhere in the Sacramento River in your division, the same procedure would have been followed under the instructions from your chief, would it, as in this case? A. Practically, yes.

(Testimony of Charles R. Hall.)

Q. Well, practically. What do you mean b that?

A. Well, it depends pretty much upon what sec tion of the river it was in, just what procedur there would be taken to locate the obstruction.

Q. Mr. Hall, what I am trying to get at is thi the other Mr. Hall laid the foundation for puttin in evidence these diagrams, notes, etc., that thi was pursuant to instructions from your depart ment, that you followed out this plan. Now, wha I want to know is whether or not in all cases, w will say for instance if some barge of the Sacra mento River Transportation Company should sin somewhere in your division, would the same [102 procedure have been followed? A. Yes.

Q. You would have been required to locate th boat where it was sunk in the river? A. Yes.

Q. And to locate what the obstruction was?

A. Yes.

Q. And to make a report to your superiors?

A. Yes.

Q. How were those instructions to you, in writ ing, or how did you get your instructions on tha subject?

A. Well, I don't recall originally just how the were; it had been the custom of the department fo a long, long time.

Q. You understand that I am not aiming t question you about it, but I want to find out wher your instructions came from.

The COURT.—Q. Were your instructions i

(Testimony of Charles R. Hall.)

writing, or over the telephone, or how, or did you act on previous instructions?

A. I acted in this particular case on previous instructions.

Q. On previous instructions, how had they come generally?

A. On previous instructions they had generally been over the telephone.

Mr. FORD.—Q. Been over the telephone?

A. Yes.

Q. What I am gettng at is whether or not the Government or War Department, by any rule or regulation, and I presume any rule or regulation would be in writing, required such reports as have been put in evidence here to be made to the Department?

A. On any occasion of this kind in the navigable rivers, over which the War Department has control, the War Department always makes surveys and ascertains all the facts of the case, for their own records.

Q. Did you make this survey without any instructions from your superior, or did you require some communication from your superior?

A. Well, I do not recall whether I had any communication with him at this particular time or not; I certainly had—before the survey was made I informed him of what had happened, and what I was doing.

Q. Did you make any reports to Colonel Rand concerning this matter? A. Yes. [103]

(Testimony of Charles R. Hall.)

Q. Did you make any report to Colonel Rand concerning the location of this accident with reference to the two bridges? A. Yes.

Q. That had been there?

A. Oh, let me see; I don't recall that I did, no.

Q. That is what you were trying to determine, were you not, what had caused this particular accident, and the responsibility?

A. No; that was not what we were trying to determine at all.

Q. You were under instructions from Colonel Rand, you went ahead and had this piling taken out, didn't you?

A. Had them taken out—they are not out yet.

Q. They are not out yet? A. No.

Q. Didn't Colonel Rand—

A. (Intg.) Colonel Rand has been endeavoring to have the Southern Pacific take them out for the last year.

Q. Didn't Colonel Rand have them taken out?

A. No.

Q. How do you know he did not? Will Colonel Rand be a witness here, Mr. Hall?

Mr. HALL.—I don't know.

Mr. FORD.—If he is going to be produced here I don't want to examine this witness and consume the time of the Court; but if he is not going to be produced here I want to question this witness further.

Mr. HALL.—If counsel wants him here, I will notify him, or subpoena him if you want him.

(Testimony of Charles R. Hall.)

The COURT.—Q. Do you know, of your own personal knowledge, whether they were taken out?

A. As far as I know they were not taken out, and have not been taken out.

The COURT.—Of course, that testimony is of a negative character, and the witness would not know unless he has seen them there lately.

The WITNESS.—They are under water and you cannot see them.

Mr. HALL.—We have a photograph of them there in 1919.

Mr. FORD.—Q. You say you did make your reports to Colonel Rand on the matter?

A. Yes. [104]

Q. Was it not Colonel Rand's division, to whom you reported? A. Yes.

Q. Whatever matters were reported then, from your office, were reported to Colonel Rand?

A. Yes.

Q. When did you leave the service of the Government at Sacramento?

A. I think it was August the 17th.

Q. I will ask you whether or not it is true that under date of at least August 2d this piling had been removed?

The COURT.—This year?

Mr. FORD.—August 2d of 1919.

The COURT.—I don't think he would have any knowledge.

Mr. FORD.—Q. You left the employ of the Government when? A. August 7, 1918.

(Testimony of Charles R. Hall.)

Q. I beg your pardon. So if they had been removed since that you don't know?

A. Not of my own personal knowledge.

Mr. HALL.—Your client has a letter from Colonel Rand on a very recent date.

Mr. FORD.—How do you know that?

Mr. HALL.—Because I saw it.

The COURT.—This witness does not know anything about it.

Mr. FORD.—Counsel did not say before he saw the letter; I rather assumed that he had been seeing some correspondence between Colonel Rand and ourselves.

Mr. HALL.—Sure. They are public records you can see them.

Mr. FORD.—I am surprised to hear it, because I tried to get some information and I could not get it.

Mr. HALL.—They were not refused to me.

Redirect Examination.

Mr. HALL.—Q. Mr. Hall, you were on the "Thor," you said, in your cross-examination, every day for a week or more, were you not? A. Yes.

Q. You have seen these figures extending from the bow of the boat to the crib of the present drawbridge, 63 feet? A. Yes. [105]

Q. Also the figures from the stern of the boat to the protection of the drawbridge, 110 feet?

A. Yes.

Q. You may state to the Court whether or not in your opinion that represents fairly accurate meas-

(Testimony of Charles R. Hall.)

urements of the distances from the bow and the stern of the "Thor" to that crib work?

A. I think it represents very accurate measurements.

Recross-examination.

Mr. FORD.—Q. How far would you say it was from the corner of the boat, the rear corner nearest the Sacramento side to the wharf?

A. To the wharf?

Q. Yes, without looking at the diagram.

A. Somewhere in the neighborhood of 60 feet.

Q. How did you arrive at that? Did you arrive at that from observations at the time?

A. Yes.

Q. So you did make fairly accurate observations?

A. Naturally, I was there every day.

Mr. HALL.—I now ask counsel for the respondents to produce for the Court to-morrow morning at ten o'clock copies of any letters that may have been written by the Southern Pacific or the California Pacific Railroad Company to Colonel Rand, and any original letters from Colonel Rand to the Southern Pacific Company, in regard to the removal of these piers.

Mr. FORD.—If you will lay the foundation for them we will produce them.

Mr. HALL.—I think you have laid it in your reference to Colonel Rand.

The COURT.—Is that all with this witness?

Mr. HALL.—Yes.

Testimony of Henry Fuse, for Libelant.

HENRY FUSE, called for the libelant, sworn.

Mr. HALL.—Q. What is your occupation, Mr. Fuse? A. Submarine diver.

Q. How long have you been a submarine diver?

A. About 12 or 15 years. [106]

Q. Where do you live?

A. 175 Alma Street, San Francisco.

Q. Were you called to the city of Sacramento, or the vicinity of that city, in July, 1918, to make any diving around the dredger "Thor"?

A. I was.

Q. Do you remember the day that you went up there?

A. It was on a Sunday, I think July 14th.

Q. What time did you arrive on the "Thor" that night?

A. Sunday night, about nine o'clock.

Q. Did you make a dive that night? A. No.

Q. When was the first dive you made?

A. The following morning.

Q. From what point on the deck of the vessel did you dive?

A. I went off the starboard side on the after end.

Q. That would be the downstream end on the Sacramento side, would it not?

A. On the Sacramento side; yes.

Q. Just explain to the Court what you found on your first dive.

A. Well, the first dive I made I never did get

(Testimony of Henry Fuse.)

down to the bottom, on account of the tide running, it took me away down the river, so I decided I could not do anything on the outside until slack tide, and instead of waiting for the slack tide I went inside the dredger.

Q. What did you find inside?

A. Inside the dredger I found it full of water and nothing else; I had to hunt for the holes.

Q. Did you find any holes in her?

A. After searching around for a while I located a bulge up in the floor inside of the hull.

Q. Where was that with reference to the hatchway?

A. Up right underneath the hatch.

Q. About what was the size of that bulge up in the bottom of the boat?

A. That floor must have been at least ten inches up.

Q. Was there more than one bottom in that boat?

A. Well, there was a double bottom, what they call a double bottom, that is the bottom, and then there is your cross-timbers and your fore-and-aft timbers, and then they had a double floor on there. [107]

Q. What was the distance between this double floor that was on top of the fore-and-aft timbers and the real bottom of the boat?

A. I could not tell you exactly, but it must have been somewhere around 20 or 24 inches.

Q. So that even then the top floor in the bottom

(Testimony of Henry Fuse.)

of the boat was bulged up? A. Yes.

Q. About what was the dimensions of that bulge under the hatchway?

A. That bulge was at that time probably four feet square.

Q. What is the next hole that you found?

A. After I found this bulge, I had to tear it all up, to look at the hole and fix that hole up; I presumed that was the only hole then, but after that I located a hole on the after end of the port side.

Q. That would be toward Yolo County?

A. On the Yolo County side; there was one pile there through the bottom; after tearing up the hole, I found one pile sticking up, but later on I found at least—I didn't see it, but the other diver that came up later found three piles on the ouside of that same hole.

Q. Now, then, did you find a hole up near the bow and right at the rake?

A. There was a hole there with a pile right through.

Q. Did that pile go through both floors of the bottom? A. That pile was up in the rake.

Q. It was up in the rake? A. Yes.

Q. How did you repair and take care of that piling up there?

A. We built a coffer dam around that.

Q. Was that single pile, or was it a cluster of piles?

A. It was a single pile through the hole, but it was from a cluster.

(Testimony of Henry Fuse.)

Q. There was a cluster around it? A. Yes.

Q. Did you tell me whether or not you sawed off the cluster of piles that caused the bulge underneath the hatch?

A. I did saw them, part of them.

Q. How many piles were there in that cluster?

A. There were 12 or 13, I don't remember, quite.

Q. Were the tops of those piles level?

A. No, they were ragged, [108] evidently having been blasted off.

Q. They had been blasted off? A. Yes.

Q. How much higher did some of them stick up than others?

A. They ranged three or four feet, five feet, some of them.

Q. Now, was the pile which went through the rake sawed off square, or was it blasted off?

A. It was blasted on the top; maybe broke off, I don't know.

Q. But it was irregular, it was not sawed off square? A. No.

Q. Did you find some timbers on the outside of the "Thor," on the starboard or Sacramento side?

A. On the Sacramento side I found two square timbers about four feet away from the hole, about 30 feet from the forward end of the first one, and the other one maybe ten feet further along toward the middle.

Q. Those were square, and not round piles?

A. They were square timbers.

Q. About what size were they?

(Testimony of Henry Fuse.)

A. Either 14 by 14 or 16 by 16, I am not positive.

Q. Did you saw those off?

A. We did saw them off.

Q. You and Mr. Porter sawed those off?

A. Yes.

Q. How much of those piles did you saw off and take up on the deck of the "Thor"?

A. The square ones?

Q. Yes. A. Two.

Q. About what length were the pieces that you sawed off?

A. The length was about four feet—three to four feet.

Q. Did you find any punctures through the stern of the "Thor," of the downstream end?

A. No, not on the stern; the furthest one aft was right in front of the boiler.

Q. How many piles was in that place?

A. There was one pile clear through, and the second pile bulged up, but Mr. Porter was down there and he reported three piles in that place; I did not see them from the outside, but I saw them from the inside. [109]

Q. Did you saw those off?

A. No, we built a cofferdam, fixed it up around the frame to lift it, and the dredger raised itself off with that.

Q. Were there any other holes through the bottom of that hole that you have not described?

A. Yes.

Q. Tell where they were.

(Testimony of Henry Fuse.)

A. They were right underneath one of the oil pumps; there was a pile through the bottom.

The COURT.—That is a question of damages, more than anything else.

Mr. HALL.—Yes, but it goes to another point, that is, as to the number of piles; it may have some bearing as to the use to which they were put.

A. Right where the hatch was, where I found that cluster, on the angle out there, there was another two piles, or one, I am not sure, but it showed very plain; it did not go through the planks, it bulged the planks up; we just caulked that up.

Q. Did you make any examination under the hull of the "Thor," or did you make any observations as to the number of these piling that were under the hull of the "Thor," both the pilings that bulged up or went through her bottom and those that did not touch the bottom?

A. I did not make an examination, but I worked on it, and I found quite a number of them.

Q. About how many did you find underneath the hull of the "Thor"?

The COURT.—Those are all shown by the Government plat, are they not?

Mr. HALL.—I think not.

The COURT.—I suppose the Government discovered all when it made the survey, did it not?

Mr. HALL.—I think not.

A. Thirty or forty.

Q. Thirty or forty piling under the hull of the "Thor"? A. Yes.

(Testimony of Henry Fuse.)

Q. Do you know whether or not the "Thor" settled on any piles after you got there that she was not resting on when you first made your examination of her?

A. No, the time I got there the "Thor" was resting on the big cluster. [110]

Q. On the big cluster? A. Yes.

Q. Was the bottom of the river washed out around those piles? A. How do you mean?

Q. Had the current carried the sand and the silt away from around the piles, so that the water was deeper around them?

A. Yes, it had, but I don't know how much.

Mr. HALL.—That is all.

Cross-examination.

Mr. FORD.—Q. Mr. Fuse, your examination, you say, was all from the inside of the boat, or did you afterwards go down underneath the boat on the outside?

A. As soon as I could go outside I did; that is, after I found this cluster I had to go on the outside to cut out about three or four piles; I had to do that under the handicap of the current. I went through the dredger, through that hole I made, and got out under the bottom of the dredger. Then I was shifting from the cluster to different piles around there; I always had to have something to hold on to.

Q. How far down in the water was the "Thor" at the time you arrived there? Was it level, or was

(Testimony of Henry Fuse.)

it listed to one side or the other?

A. She had very little list, if she had any.

Q. Was she completely submerged, or only partly?

A. Oh, she was probably a foot or eighteen inches above the water.

Q. On both sides?

A. Well, one side may have been a little higher.

Q. Did she rest on the bottom of the river on either side?

A. She rested on the sand and piles on a diagonal, from the lower part of the river up, diagonal to the front end, she rested on piles and sand.

Q. Will you step down to this diagram for a moment; I understand this is the Sacramento side, and over here the Washington side of the river, and here is what—what do you call that, Mr. Hall?

Mr. HALL.—That is the crib of the drawbridge. [111]

Mr. FORD.—Here is that jetty over here on the Washington side; this little parallelogram is supposed to represent the "Thor" where it lay there in the stream. Will you indicate on the diagram what part of the "Thor" rested on the river bottom or sand?

A. She rested about like this.

Q. About as I have drawn a line?

A. She may have come over here some place like that; she rested on piles along here; I discovered several piles level with the sand, where she was resting hard on it; that is as far as she went.

(Testimony of Henry Fuse.)

Q. The river bottom there was of sand, was it, a
that point?

A. At that point it was sand, and at this point ther
probably was ten or twelve feet of water.

Q. Where this cluster was?

A. Where some of the cluster on the inside was
was five feet, and on the outside it was about eight, o
nine, or ten feet.

Q. Had you dived up in that vicinity before this

A. No.

Q. The only reason I ask you that is to know
whether or not you had observed there had been an
change in the channel of the river in that location.

A. No.

Q. You don't know about that? A. No.

Q. Did you take any measurements yourself there
or observations with reference to any objects on th
bottom of the river, on either side of this protectio
pier, they call it, on the bridge? A. No.

Q. You would not be able to say where the "Thor"
was located, along what part of that protection pier

A. I could tell by looking at it.

Q. Did you take any observations that you have i
mind now? A. Well, yes.

Q. So as to be able to fix fairly accurately the loca
tion of the "Thor"? A. Yes, I guess I could.

Q. Tell the court about that.

The COURT.—Is it shown correctly on that plat

A. It looks to me like it. [112]

Mr. FORD.—Q. You say that the first place yo
discovered was this cluster of piles, and I assume tha

(Testimony of Henry Fuse.)

that is the cluster shown on this map near the front end of the boat.

A. Yes—no, not on the front—it is a little to the side, toward the front end.

Q. A little to the side? A. Yes.

Q. To which side, the Washington side or the Sacramento side?

A. A little to the Washington side.

Q. How far back from the front was that cluster, would you say?

A. In the first place, or the second place?

Q. The first piling in the front went through—

A. (Intg.) The rake.

Q. The rake?

A. Yes; that was near the middle; that was on one side of the middle; you see, there is a bulge running fore-and-aft.

Q. Was that on the Washington or Sacramento side? A. That was on the Washington side.

Q. Now, then, this cluster of piles was next going back to the rear? A. Yes.

Q. This cluster of piles was, you say, on the Washington side? A. Yes.

Q. How far would you say back from the rake?

A. From the rake, six feet—six or seven feet, I don't remember just now how big your frames are. You know, your bottom is laid out in frames, fore-and-aft and crossways.

Q. The trouble about it is that I don't know anything about it.

Mr. FORD.—I think, your Honor, we might not

(Testimony of Henry Fuse.)

lose time if he might draw a little diagram of the bottom, so we could use it.

A. It was like this. There is a rake on there.

Q. The first place was through the rake?

A, Yes, the first place was through the rake; we built a cofferdam around it. The next place was right here; there was another fore-and-aft timber gone here, entirely broken off. [113]

Mr. HALL.—I have a diagram that will probably help you, if you care to have it. These are the different squares.

Mr. FORD.—Q. How many separate punctures did you find there in the bottom of the boat, if you remember? A. Six or seven.

Q. And extending over what place from the front back—how far, about, was it, would you say, from the first puncture to the furthest one back?

A. The furthest one back was in front of the boiler.

The COURT.—How far were the furthest ones apart?

Mr. FORD.—Q. From the one in the rake to the one furthest back in the rear, how many feet would you say it was? A. About 60 or 70 feet.

Mr. FORD.—That is all.

Mr. HALL.—That is all.

Testimony of J. A. Johnson, for Libelant.

J. A. JOHNSON, called for the libelant, sworn.

Mr. HALL.—Q. What is your business?

A. Shipbuilder.

Q. Do you know the "Thor"? A. Yes.

(Testimony of J. A. Johnson.)

Q. Did you build her? A. Yes.

Q. Were you present when she was down in the river in Sacramento in July, 1918?

A. I arrived on the dredger on July 14th.

Q. July 14th? A. Yes.

Q. Did you make an examination of her?

A. Yes, partial examination on that evening, that afternoon, and the following morning, when the diver came.

Q. What was her condition when you saw her?

A. She was submerged.

Q. How long did she remain submerged there?

A. How long?

Q. Yes.

A. We were ready to leave there, I think it was, the 3d of August.

Q. Did you go with her to the drydock?

A. Yes. [114]

Q. Did you make an examination of her hull in the drydock to ascertain what injury had been done to her? A. Yes.

Q. Tell the Court what you found in the bottom of the "Thor."

The COURT.—There is no controversy over these matters, is there? I infer, from what Mr. Ford has said, that there would not be any controversy over these matters.

Mr. HALL.—It is in a way cumulative as to the extent of that injury, but I want to show the wide-spread separation of the different piles there.

(Testimony of J. A. Johnson.)

The COURT.—In a very general way I will allow it.

Mr. HALL.—Q. How many holes did you find over her bottom?

A. Five holes punctured through, and then some punctures that did not go through.

Q. How many of those were punctures that did not go through or bulge?

A. I think there were two or three places that showed on the drydock.

Q. Where was the one nearest the bow of the boat?

A. On the rake.

Q. Where was the one nearest the center of the boat?

A. Forward of the boiler, directly under a fore-and-aft timber that holds the main shaft.

Q. About how far was it from the puncture near the rake to that under the boiler near the stern?

The COURT.—The distance between the two holes.

Mr. HALL.—The distance between the two holes.

A. The distance between those two holes is somewhere about 44 feet. I could not tell very closely from the drawing, that is, I could show you on the drawing; if you had a drawing, the scale on that would be more correct.

The COURT.—That is near enough, probably, for practical purposes.

Mr. HALL.—I think so.

Q. Across her beam how widely were the punctures separated?

A. The one at the rake was close to the center arch,

(Testimony of J. A. Johnson.)

on the port side of the center arch; that is the one that we cofferdammed. [115]

Q. I mean taking the extreme puncture on the Washington side, the Yolo County side, and the extreme puncture on the Sacramento side what was the distance between those two punctures?

A. About eight or nine feet, the first one, and then the others—about eight or nine feet, I think.

The COURT.—Q. The extreme distance from one side of the boat to the other. How far were the furthest holes apart?

A. The furthest apart from the port side to the starboard side?

Mr. HALL.—Yes.

The COURT.—Approximately.

A. That would be about 30 feet, something like that—30 or 40 feet.

Mr. HALL.—Q. You built the "Thor," I believe you said? A. Yes.

Q. Where was the weight of the "Thor," in the stern or the bow?

A. The bow; she drew more water forward than aft.

Q. The weight was due to what?

A. That was due to the length of the boom and the balance of the machinery, and the bucket, the heavy weight of the bucket being on that side of the center.

Q. If she were being allowed to drift downstream with the stern forward, which end of the boat would be deeper in the water?

The COURT.—The heavy end.

(Testimony of C. Dech.)

A. The heavy end, the bow.

Mr. HALL.—That is all.

Mr. FORD.—No cross-examination.

Testimony of C. Dech, for Libelant.

C. DECH, called for the libelant, sworn.

Mr. HALL.—Q. What is your name?

A. C. Dech.

Q. What is your occupation?

A. Leverman on the dredger.

Q. You are employed by the Olympian Dredging Company, I believe? A. Yes.

Q. Were you on the "Thor" on July 13, 1918?

A. Yes.

Q. Were you in charge of the lever when you were dropping her downstream?

A. Yes, I was in the pilot-house. [116]

Q. You were in the pilot-house at that time?

A. Yes.

Q. Will you tell the Court briefly what happened on your way downstream?

A. We were ordered to move at twelve o'clock; when we got down to the bridge we blew the whistle for the bridge, and moved a little further and stopped; of course I shifted the boom so as to draw the machine that way, and it did not move, as far as I could tell, and I didn't know anything else except the ship was sinking.

Q. Did you go down? A. I did immediately.

Q. And found that she was sinking? A. Yes.

(Testimony of C. Dech.)

Cross-examination.

Mr. FORD.—Q. About how much below the surface of the water was the bottom of this boat as she would be running along the river?

A. Between five and six feet, I guess.

Q. So she drew about five or six feet of water?

A. Yes.

Mr. HALL.—I ask counsel now if he has present the contract release between the California Pacific and the Southern Pacific Company?

Mr. FORD.—Yes.

Mr. HALL.—What is this?

Mr. FORD.—That is out of the Railroad Commission books.

The COURT.—It may be considered as read.

Mr. HALL.—It is in a volume entitled "Railroad Commission Case, motion for injunction *pendente lite,* bill in equity, bill of intervention, and affidavits," and it is found on page 30 et seq. of that portion or volume which purports to be affidavit No. 3 of James I. Stanton.

The COURT.—What does the document, itself, purport to be?

Mr. HALL.—It purports to be the contract between the California Pacific, by which it leased this line of railroad to the Southern Pacific Company.

(The lease was as follows:)

"This agreement, made this first day of November, 1886, [117] between the California Pacific Railroad Company, a corporation, organized and existing under the laws of the State of California, party of

the first part, and the Southern Pacific Company, a corporation organized under a law of the State of Kentucky, and now doing business as a Railroad corporation in the State of California, party of the second part:

WITNESSETH:

That the party of the first part hath granted, demised, and letten, and by these presents doth grant, demise, and let unto the party of the second part, its successors and assigns, for the term of Fifty years from the first day of November, 1886, all of its Railroad and Telegraph Lines situated in the State of California, and described as follows, to wit:

Commencing at South Vallejo, in the County of Solano, and running thence to the City of Sacramento, with a branch commencing at Adelante, in Napa County, and running thence to Calistoga, in said county, and with a branch commencing at Davisville, in Yolo County, and running thence to Knight's Landing, in said county, being the whole of the Railroad known as the California Pacific Railroad and Telegraph Lines.

And also all the wharves at the terminus of said Road at South Vallejo, and also all superstructures, depots, grounds, workshops, rolling-stock, and all real and personal property of every kind belonging to the party of the first part, and used in connection with said Road and Telegraph Line.

Together with all the corporate rights, privileges, and franchises of said party of the first part pertaining to said Road or Telegraph Line, and all and

singular the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, with the right to possess, maintain, use and enjoy the said property, and to receive the rents, issues, and profits thereof.

And,

This Indenture Further Witnesseth, That the party of the second part, in consideration of the premises, covenants and [118] agrees to and with said party of the first part, its successors and assigns, as follows, to wit:

FIRST.

That it will pay said party of the first part, as rental, the sum of six hundred thousand dollars ($600,000) per annum in United States gold coin, or in the interest coupons attached to outstanding bonds of the said party of the first part, and that it will pay said annual rental, one-half thereof on June 15th, and the other one-half thereof on December 15th of each and every year hereafter duing said term of fifty years.

SECOND.

That it will, during said term, keep and maintain said property in good order, condition and repair, operate, maintain, add to, and better the same at its own expense; and will pay all taxes legally assessed against or levied thereon, and that it will at the termination of this lease return said property in good order and condition to the party of the first part, upon payment by said party to it, of the then cash value of the additions and betterments made by the

party of the second part, during the term of this lease.

THIRD.

That it will, during said term, pay all legal expenses incurred in the operation and management of said property and all losses and damages sustained through the negligent operation and management of the same.

And,

This Indenture Further Witnesseth, That the terms of this indenture, including the rate of rental, shall be subject to alteration or revision at the expiration of each period of five years upon the demand of either of the parties hereto. That the party making the demand shall specify, in writing, the alteration or revision it desires to have made, and shall submit the same to the other party. That if the parties cannot, within a reasonable time thereafter, agree upon such [119] alterations or revisions, the subject-matter shall be referred to three arbitrators, one to be chosen by each party, and the third by the two so chosen, and the decision of a majority of the arbitrators upon the matters submitted shall be conclusive upon the parties hereto.

IN TESTIMONY WHEREOF, the parties hereto have caused these presents to be signed by their respective Presidents and Secretaries, and their corporate seals to be hereunto affixed.

IN DUPLICATE.

(Seal) RICHD. P. HAMMOND,
President of the California Pacific Railroad Company.

W. V. HUNTINGTON,
Secretary of the California Pacific Railroad Company.

(Seal) LELAND STANFORD,
President of the Southern Pacific Company.

E. H. MILLER, Jr.,
Secretary of the Southern Pacific Company.

[Endorsed]: California Pacific Railroad Company. Lease of all property to the Southern Pacific Company for fifty years from November 1, 1886."

Mr. HALL.—I have one more witness that I am trying to get here, and I think I will close very shortly.

The COURT.—What is the testimony as to?

Mr. HALL.—The other diver; he made a more detailed examination under the hull of the vessel in regard to those piles, but I would like to show that by him.

Mr. FORD.—May I make this suggestion, your Honor, while we are waiting for him: As your Honor has probably seen, our situation here is such that it is almost impossible to put a defense in here in court; I was going to ask your Honor if it is not inconsistent with all reason that the matter be referred [120] to the court reporter as commissioner to take this testimony; we could shorten the matter very much if that could be done.

The COURT.—I see no objection to that.

Mr. HALL.—I would like to get the matter finished up. That means that we will have to have another session in court, and possibly your Honor will then determine the question of liability; then if it came up to a question of an accounting, your Honor would then have to refer it to the commissioner to take the account, and it would then be referred back to the court again.

The COURT.—You can take the testimony before the reporter as rapidly as before me.

Mr. FORD.—We can eliminate everything that it is possible to eliminate. A great many of these matters I think can be stipulated to.

Mr. HALL.—When will you be ready to go ahead?

Mr. FORD.—I will be ready to go ahead to-morrow morning.

The COURT.—Do you know what time your witness will be here, Mr. Hall?

Mr. HALL.—I think I can get him here by ten o'clock to-morrow morning.

The COURT.—His testimony will be substantially the same as the testimony of the other diver, I presume.

Mr. HALL.—Substantially so, only he will go a little further in detail.

Mr. FORD.—Why not take his testimony before the commissioner?

Mr. HALL.—Very well.

The COURT.—Well, this will close the case as far as the testimony before the court is concerned, and I will refer it to Mr. Lehner.

Mr. HALL.—Will your Honor fix some limitation

on the time in which we may take testimony? [121]

Mr. FORD.—I was going to suggest this, if you can go right ahead and take your testimony concerning damages the court will have everything before it. I do not apprehend the testimony as to damages will be lengthy at all.

The COURT.—Take the whole thing before the commissioner, so that it will all come back on one report.

Mr. FORD.—I have no testimony on damage in any way.

Mr. HALL.—I would like to have some limitation on the time.

The COURT.—You will be ready to proceed to-morrow, Mr. Ford?

Mr. FORD.—Yes.

The COURT.—You can proceed to-morrow at ten o'clock.

(An adjournment was here taken until to-morrow, Thursday, December 4, 1919, the taking of the testimony to be before the commissioner.)

[Endorsed]: Filed Jan. 28, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [122]

In the District Court of the United States for the Southern Division of the Northern District of California, First Division.

(No. 16,630.)

Volume 3.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Testimony Taken Before E. W. Lehner, Special Commissioner.

Thursday, December 4, 1919.

Counsel appearing:

For the Plaintiff:

FRANK HALL, Esq., THOMAS T. HAVEN, Esq., and JAMES E. SPILLMAN, Esq.

For the Defendant: GEORGE FORD, Esq., and ELLIOT JOHNSON, Esq.

Testimony of John L. Porter, for Libelant.

JOHN L. PORTER, called for the libelant, sworn.

Mr. HALL.—Your name is John L. Porter?

A. Yes.

Q. Where do you live?

(Testimony of John L. Porter.)

A. 527 Alvarado Street.

Q. What is your business?

A. At the present time I am a submarine diver.

Q. How long have you been engaged in submarine diving?

A. More or less about 40 years.

Q. Were you employed in the month of *July*, 1918, to go to Sacramento to work on the dredger "Thor"? A. Yes.

Q. When did you get up there?

A. I have got a little memorandum here I made of that, and I will look at it; *July* 18, I went to work there. [123]

Q. Did you make a dive there at the "Thor"? Did you go down underneath the water at the "Thor"?

A. Oh, yes, I went underneath.

Q. Just tell in your own way what you found in the river, and the condition of the "Thor."

A. Commencing forward on the dredger, on the run, there was a bunch of piles of probably eight or ten, maybe a dozen, and some of them were up in the neighborhood of seven feet above the bottom.

Q. Where was that bunch of piles with reference to the hatchway?

A. It would be just about the center of the boat, about amidships, right on the run, on the rake of the barge.

Q. On the rake? A. Yes.

Q. Was there a bunch of piles near the hatch-

(Testimony of John L. Porter.)

way or underneath the hatch?

A. Yes, there was another bunch that broke right through the bottom, right underneath the hatchway.

Q. This bunch on the rake, there was more than one pile in that, was there?

A. Oh, yes, there were eight or ten, or a dozen.

Q. How did you repair that particular break on the rake?

A. On the rake, we cofferdammed it from the inside, and afterwards put a patch on; after she got away from the piles, they put a patch on.

Q. On the bottom? A. Yes.

Q. From the outside?

A. From the outside.

Q. There was another bunch, as I understand it, underneath the hatch or directly below the hatch?

A. There was another bunch underneath the hatch of the same number, probably a dozen.

Q. Where were there any other punctures, if any?

A. There were five or six, I guess, that had made holes through here in different parts of the hull, further aft.

Q. About how far, or what was the distance between the hole in the rake at the bow and the furthest one toward the stern?

A. That would be only an estimate I could give you; it must have been 60 or 70 feet, or more. [124]

Q. Were some of the holes in her bottom on each

(Testimony of John L. Porter.)

side or both sides of the center of the boat?

A. Yes, both sides.

Q. How widely separated were these? What was the distance between the two out ones?

A. Thirty or forty feet, such a matter, probably.

Q. Did you find more than two places where more than one pile went through the bottom?

A. No, there were only those two places.

Q. That were in one cluster?

A. That is as far as I know; of course, I didn't repair all of the other holes. Some of them were not a diving job, they were worked on from the inside, and I did not work on all of those.

Q. What did you do with this cluster of piles that you found through the bottom?

A. We sawed them off.

Q. About how much of the piles did you saw off?

A. Some of them we sawed off possibly four feet, somewhere in the neighborhood of that; probably that was the longest piece.

Q. Did any of the piles break through both bottoms of the "Thor"? A. Yes.

Q. Which one was that?

A. Underneath the hatch.

Q. Underneath the hatch? A. Yes.

Q. How about the one on the rake, did that break clear through?

A. It shoved the planking up, bent the planking right up; it probably shoved the planking up in there probably a foot or more.

Q. Do you remember of having found some piling

(Testimony of John L. Porter.)

on the starboard side about amidships?

A. Yes, just outside of the house; we sawed those off.

Q. How many of those were there?

A. We sawed off two.

Q. What were the characteristics of those piles?

A. The size of them?

Q. Yes, were they round or square?

A. They were square.

Q. Were any of the piles that were through the bottom of the boat square piles, or were they round piles?

A. All that I saw were round piles. [125]

Q. How many clusters did you have to saw off?

A. How many in the cluster?

Q. No, how many diffrent clusters did you have to saw off? A. One, underneath the hatch.

Q. Under the rake you cofferdammed that?

A. We cofferdammed that from the inside.

Q. Did you patch up the floor down inside of the hold?

A. Oh, yes, we had to put a patch over that.

Q. About what were the dimensions of those two square piles that you cut off on the starboard side?

A. Fourteen or sixteen inches, probably 16 inches.

Q. Were the tops of the piles that you encountered there all on a level, or were some nearer the surface of the water than others?

A. Some were even with the ground, and some were seven feet, say, above.

Q. They ran all distances, from even with the

(Testimony of John L. Porter.)

ground to seven feet above the bottom of the river?

A. Yes.

Q. So that the tops of those piles would not all be level?

A. No, the tallest piles there were were in that cluster, and the one underneath the rake was the tallest one I saw; that was probably a matter of seven feet above the bottom.

Q. The bottom might not have been on a level, uneven? A. It was fairly level.

Q. But even counting the unevenness of the bottom, from the top of the water down, some of the piles reached nearer to the top of the water than others?

A. Yes, the piles were not level, nor anywhere near it.

Q. Did you make any observations there to note whether or not the piles had been sawed off, or blown off, or broken off?

A. All I saw had either been broken or blasted.

Q. In your work on the "Thor" or under the "Thor" there, did you encounter any piles which had not punctured the bottom of the boat?

A. Oh, yes.

Q. About how many piles were there altogether underneath her hull?

A. I could not say, because you couldn't get anywhere near all [126] underneath her. I went underneath the bottom and as near as I could remember probably ran across half a dozen that were not hitting the bottom.

(Testimony of John L. Porter.)

Q. About how many piles did you see underneath her, altogether, just your best estimate?

A. I don't remember, as I say, 8 or 10 or a dozen; I did not count them; I didn't pay any particular attention to that.

Q. You saw a dozen in the group under the hatch?

A. Oh, yes. Outside of that, you mean?

Q. Different groups around outside of that?

A. All the other piles that I saw were single piles, except those two groups.

Q. Could you tell from your experience as a diver, and in handling such matters, whether those were piles that had been driven into the bed of the river, or were they pieces of piling or timber that had lodged there?

A. They were driven piles.

Mr. HALL.—That is all.

Cross-examination.

Mr. JOHNSON.—Q. Mr. Porter, when you arrived on the dredger "Thor," on the day you first went to work, where was she grounded there with reference to the shore, how far out from the Sacramento shore? A. Was the boat.

Q. Yes.

A. Well, it was across river—it must have been—I could only give you a guess at it, maybe 150 or 200 feet.

Q. From the Sacramento shore?

A. From the Sacramento shore.

Q. How far was she from the bridge?

(Testimony of John L. Porter.)

A. Well, maybe the same distance, 200 feet or more.

Q. Two hundred feet or more from the bridge?

A. Yes, above the bridge.

Q. Above the bridge? A. Yes.

Q. That is, the nearest part of the dredger was, in your opinion, about 200 feet from the bridge?

A. You remember I am only guessing at it; I am not giving you anything near accurate at all, because I never paid any attention to it; I never had any idea it would be referred to again.

Q. It was not part of your function to take any particular notice of the place where the dredger was; you were there to [127] fix it up?

A. Yes.

Q. She was in the river stern down, was she not?

A. She was heading about up and down the river.

Q. Heading about up and down the river?

A. Yes.

Q. And going from the bow of the boat astern, going aft, do you call it?

Mr. HALL.—Yes.

Mr. JOHNSON.—Q. You found, first a cluster of piles that had punctured the rake, or at least that bent up the planks underneath the rake?

A. Underneath the rake; yes.

Q. And then down under the hatch?

A. Under the hatch was another cluster.

Q. Another cluster? A. Yes.

Q. Those were about both in the center of the

(Testimony of John L. Porter.)

boat, and then further along back you found other piles which had punctured the bottom, did you?

A. Yes, those were single piles.

Q. Single piles? A. All that I saw.

Q. How close to the center of the boat was the last puncture made by a pile?

A. As near as I remember it was about two-thirds of the length of the boat from the bow.

Q. About two-thirds of the length? A. Yes.

Q. Of the way back?

A. To the last pile; that is, to the best of my recollection.

Q. And you estimate that distance to be some 60 or 70 feet between the extreme punctures running fore-and-aft?

A. Between the hatch and the furthest one aft, probably maybe 60 or 70 feet, maybe more.

Q. You say from the hatch to the furthest one back was 70 feet?

A. Yes, without knowing any measurements; I did not make any measurements.

Q. There was nobody around there making any measurements while you were working on it at that time?

A. No; we were working on it, trying to get it off, and I paid no particular attention to that.

Q. Did you continue to work on the dredger until she was removed? [128]

A. No, I did not—until we get her off the piles.

Q. Wasn't she taken away when you got her off the piles?

(Testimony of John L. Porter.)

A. I stayed with her until she was taken off the piles to float further up the river.

Q. What was done with her—where was she when you left her?

A. She was a little further up the river, off of the piles.

Q. A little further up the river off the piles?

A. Off the piles, yes.

Q. Your work was then done, and you left?

A. Yes.

Q. During the time that you were working on the boat there, did you notice any surveys being made to determine the location of the boat in the s tream?

A. No, I did not.

Q. You did not notice any men around there making measurements during that time?

A. No; there were more or less people around there, and I of course being in a diving suit would not be in a position to see.

Q. You did not observe them yourself?

A. No.

Q. There were men around there, but you did not pay any attention to what they were doing?

A. No.

Q. What I want to get at is this: What is the extreme distance from this puncture which was in the rake, that is the first puncture going from the bow to the stern, to the extreme sternward puncture?

A. Well, as I told you, I don't know, and I am only making a guess at it; probably from the rake

(Testimony of John L. Porter.)

to the extreme one there might be 100 feet, maybe a little more.

Q. A little more than 100 feet would be your best guess?

A. Say 100 feet, more or less. I don't know now the length of the ship. If I knew the length of the ship I could give a better estimate.

Mr. HALL.—She is 120 feet long.

A. Well, it would not be so much.

Mr. JOHNSON.—Q. Assuming that the boat is 120 feet long; how far would you say that distance was?

A. The extreme distance would be somewhere around, say 70 feet, then.

Q. How far back on the boat was the extreme sternward puncture? [129]

A. That is the one I am speaking of.

Q. How far back from the stern was that puncture?

A. Well, it was, I judge, about two-thirds of the length of the ship, as near as I remember.

Q. Two-thirds of the way back was the most sternward puncture?

A. Yes, as far as I remember; I did not work on all of them. You know, they were cofferdamming and patching them up from inside.

Q. But you had a general observation of where those holes were, didn't you?

A. There might have been some that I did not see, that they backed up; they were working night and day on it; they worked when I was not there;

(Testimony of John L. Porter.)

they might have patched up something that was still further aft, that I know nothing about.

Q. When you first got on the boat, who was in charge of the divers there?

A. Mr. Johnson was in charge.

Q. Mr. Johnson was in charge, and how many divers were there? A. Two.

Q. There were two of you? A. Yes.

Q. Did the two of you work on all of the holds?

A. No, it was not necessary; some of the holes we did not work on at all, the divers did not.

Q. Did you make any inspection of her underneath?

A. I was the only one that was underneath, except where that cluster of piles was under the hatch.

Q. Did you inspect the bottom, other than around that particular cluster?

A. You could only go under a small part of her, and the part I went under I found piles, some of them broken off or dynamited right down at the bottom; others were higher up; some of them went up to her bottom, and one went up through her bottom.

Q. One pile went through her bottom?

A. Yes, that I found from going underneath the bottom.

Q. That is, a single pile went through her bottom? A. Yes.

Q. Taking the places where she was punctured, the extreme distance from one side to the other of

(Testimony of John L. Porter.)

the boat, what would you say, from your observation, was the extreme distance between the two punctures, the extreme punctures going crosswise on the boat? [130]

A. Possibly somewhere around 30 or 40 feet.

Q. Thirty or forty feet? A. Yes.

Q. What were these punctures on these extreme sideward punctures?

A. All I saw were made by single piles.

Q. Single piles? A. Yes.

Q. Now, in this cluster of piles that was underneath the hatch, how many piles, approximately, were there? A. Say a dozen.

Q. A dozen? A. Yes.

Q. How big a space were they located in?

A. They were drove pretty close together; they broke a place through the bottom, say something like 6 by 8 feet, that we had to patch.

Q. Six by eight feet was about the size of the patch? A. Yes.

Q. So these piles were driven about as close together as you could drive them?

A. Yes, just about as close as they could drive them.

Q. That cluster? A. Yes.

Q. How far did that cluster of piles protrude out of the bottom of the river?

A. Four feet, I should say.

Q. Were they nearly of a length?

A. Even lengths.

Q. Yes, that particular cluster.

(Testimony of John L. Porter.)

A. They were of different lengths.

Q. The longest one of that cluster would be four feet out of the bottom?

A. No; the longest one of that cluster we cut off in the neighborhood of four feet; you see, they just stand on the bottom and saw off about that distance.

Q. How long was the longest pile out of the bottom in feet in that cluster under the hatch?

A. Six or seven feet.

Q. Six or seven feet? A. Yes.

Q. How deep was the water there?

A. Underneath her bottom, from the bottom of the boat down to the bottom of the river?

Q. Yes.

A. Somewhere about three or four feet.

Q. Three or four feet? A. Yes.

Q. Underneath there? A. Yes.

Q. You got underneath the boat, did you, and sawed them off? A. Yes. [131]

Q. Sawed these piles off?

A. But the bottom was pretty uneven there; the current, you know, would carry the sand away from a cluster of piles like that, eddy in there and dig a hole.

Q. Then there was a depression around this cluster of piles in the bottom? A. Yes.

Q. So there was deeper water right around the cluster of piles than at any other place on the river —I won't say any other place on the river, but the balance of the bottom under the dredger?

(Testimony of John L. Porter.)

A. It appeared like the sand had cut out som there.

Q. How much would you say the sand was cu out?

A. I don't think more than a couple of feet, i it was that.

Q. Then the longest pile there in that cluste under the hatch extended from the bottom, which had been cut out some around the piles about five or six feet up?

A. A little further than that; we cut off about four feet, I should say, off the longest one, and probably cut it up a matter of somewhere between two and three feet from the bottom.

Q. You cut them two or three feet from the bottom; all of them?

A. Yes, cut off about four feet, so that would make that pile in the neighborhood of seven feet.

Q. In the neighborhood of seven feet?

A. From the bottom.

Q. All the piles in that cluster protruded out of the bottom?

A. No; they were broken off in different lengths, some of them in that cluster were broke off pretty close down to the bottom.

Q. Some you did not have to saw?

A. Yes, some we did not saw at all.

Q. How many would you say you sawed?

A. We probably sawed half of them.

Q. Probably six? A. Yes.

(*Testimony of John L. Porter.*)

Q. If there were a dozen, six required sawing off? A. Yes.

Q. What did you do with the tops of the piles which you sawed off?

A. When we sawed them off they went up.

Q. On the outside of the boat, or on the inside?

A. Inside.

Q. Inside, and went up through the hull, did they? A. Yes.

A. Yes, there was a hole, them planks was all cut away, so you could put a patch down—there was a hole through the bottom. [132]

Q. And the hole that was cut to put the patch on was, in your opinion, about six by eight?

A. Yes.

Q. Going to the cluster that was up there around the rake, how long was the longest pile protruding out of the bottom in that cluster?

A. About somewhere in the neighborhood of 7 feet; I could not reach the top of it.

Q. When you were standing on the bottom you could not reach the top? A. No.

Q. Was the bottom of the stream likewise scoured out around that cluster of piles?

A. Well, it is a little hard to say just how that was.

Q. What is your opinion now, as you remember it?

A. There might have been some sand taken away from there, but probably about the same as the other cluster.

(Testimony of John L. Porter.)

Q. About the same as the other cluster?

A. Yes.

Q. In that cluster of piles, did you saw the tops off at all?

A. No, I did not saw any off of them.

Q. As far as you know, they are still there?

A. They are there yet, so far as I know.

Q. Was there water enough above that cluster of piles to float the boat? They did not go through the bottom, did they?

A. There was one cluster that she settled on and caved in one of the planks and broke another one.

Q. From your opinion, had she settled down on that cluster, or had she struck that cluster?

A. Well, I don't know; they were high enough, if she struck it she would damage herself.

Q. When the boat was floated, eventually floated, it could float right over that cluster, couldn't it?

A. I don't think it could; I don't think it would ever float over the cluster.

Q. You don't think it ever would? A. No.

Q. Was there any evidence along the bottom of the boat, so far as you observed, that that cluster, one of the piles of which punctured the rake, had caused any of the damage on the bottom of the boat as she passed over them?

A. The piles in that cluster? [133]

Q. Yes.

A. I don't think she ever passed over that cluster.

Q. You don't think she passed over them?

(Testimony of John L. Porter.)

A. No, that one up forward, I don't think; I don't know.

Q. Maybe I misunderstand the position. As I understand it, that cluster up forward was in about the middle of the boat going from one side to the other?

A. She could have swung in on that after passing over it; she might have passed over it, but I don't know whether she could or not.

Q. Your present idea is she swung in on that cluster probably after she had grounded on the other one?

A. I don't know; I don't know how she went on, or anything about it.

Q. You don't think that she passed over that cluster?

A. No, I don't think that she passed over it. As I am telling you, I don't know anything about whether she did or not; she might have done it.

Q. That cluster was not touching the dredge at all?

A. There might have been water enough for her to have passed over it; I don't know how much water was on the top of the pile to the surface. All I know is about how high they were sticking out of the ground; they were sticking out of the ground in the neighborhood of seven feet; whether there was 7, or 10, or 2 feet from there to the top, I don't know.

Q. You don't know anything about the depth of the water?

(Testimony of John L. Porter.)

A. No, I did not sound the depth of the water there, and I did not see anybody else sound it.

Q. Now, these isolated single piles, other than the two clusters, what part of the boat had any of those punctured?

A. Those that I know anything about, there was one back just forward of the boiler, and a little further forward on the starboard side was another one. A little further forward on the other side underneath the oil tank was another one, and I believe there were five or six scattered around. But, as I say, I did not work on hardly any of them.

Q. Did you work on any of them?

A. Yes, I patched up two holes. [134]

Q. Did you saw off any of those piles?

A. No; they were cofferdammed from the inside, those that I worked on.

Q. The boat, when she floated, would float over any of those isolated piles?

A. She would float over any of those that were underneath the bottom; they had been either dynamited or broke off considerably lower than the piles in that cluster.

Q. Mr. Porter, what would you say would be the distance between these two clusters of piles that you referred to?

A. Somewhere from 20 to 30 feet.

Q. Between 20 and 30 feet? A. Yes.

Q. Was the cluster up under the rake the same kind of a cluster as was under the hatch?

A. Yes, about the same.

(Testimony of John L. Porter.)

Q. About a dozen piles there? A. Yes.

Q. Driven as closely together as it was possible to do so? A. Yes.

Q. Now, these two square piles that you say were over on the Sacramento side, had they punctured the boat at all?

A. Well, at the time that I got up there, those piles were outside the boat altogether.

Q. Those two square piles were outside the boat altogether? A. Yes.

Q. How far outside?

A. They could not have been very far. I believe they found them with a boat hook, fishing out around there was a boat hook, to see if there was anything to prevent the boat from going off, and they found these piles.

Q. And you went down and looked at them?

A. We went down and cut them off.

Q. You sawed them off? A. Yes.

Q. How far did they protrude out of the bottom?

A. Four feet, or a little more.

Q. Four feet or so? A. Yes.

Q. You sawed them off even with the bottom?

A. As close as we could, yes.

Q. As close as you could do it? A. Yes. [135]

Q. How much water was there over the top of those piles before you commenced sawing?

A. I don't know.

Q. Haven't you an idea?

A. They were sticking up in the neighborhood of about 5 feet from the bottom. Now, I don't

(Testimony of John L. Porter.)

know how deep the water was in the river.

Q. You went down there, didn't you, and sawed them off?

A. Yes, but I don't always measure the water when I go down.

Q. You have no idea?

A. I could tell you within a few feet; it was somewhere, say, between, something less than 20 feet, we will say.

Q. Twenty feet of water over them?

A. Something less; there was not any more.

Q. Less than 20 feet? A. Yes.

Q. Did you think there was less than ten feet of water over them?

A. I would not say about that.

Q. As far as you know, those two piles had nothing to do with the sinking of the dredger?

A. I don't know.

Q. I say, so far as you know.

A. So far as I know, I don't know whether they touched her bottom, or not.

Q. Did you make any other examination for obstructions in that general locality, aside from those two piles?

A. I did not; no.

Q. You did not saw off any other piles outside of the boat, other than those two?

A. Those two is all.

Q. How long did you work up on that job?

A. I commenced on the 18th and went up to the 31st of July.

(Testimony of John L. Porter.)

Q. Worked there every day during that time?

A. More than every day; I made it 26 days and 32 dives. We were working nights and days, and Sundays were overtime.

Q. Just as a matter of information to me, on that kind of a job do you get paid by the day, or by the dive?

A. We get so much a day, whether we dive or not, and so much a dive. A dive is four hours or less.

Q. It don't matter how long you are down, the dive is four hours? A. Four hours or less.

Mr. JOHNSON.—That is all. [136]

Redirect Examination.

Mr. HALL.—Q. Mr. Porter, how far was the cluster that punctured the bottom underneath the hatch behind the cluster that punctured it through the rake?

A. About what is the distance between the two?

Q. Yes.

A. It was somewhere about 20 to 25 feet; I don't know just how far it was.

Q. You are not certain about that measurement?

A. No. I don't know how far that hatch was; you see, when you are down, you cannot look off and see a cluster of piles, or anything like that, and you can't form any idea.

Q. I suppose the plan of the boat would show that?

A. Yes, the plan of the boat would show that exactly.

Mr. HALL.—That is all.

Mr. JOHNSON.—That is all.

Mr. HALL.—I would like to read into the record this statute from the laws of California:

"CHAPTER CL.

"AN ACT

"To Grant the Right to Construct a Bridge across the Sacramento River between the City of Sacramento and the Town of Washington to certain parties therein named. (Approved April 3, 1857.)

"The People of the State of California, represented in Senate and Assembly, do enact as follows:

"Section 1. Johnson Price, V. E. Greiger, Geo. P. Gillis, together with such associates as they may admit, shall take, have, possess and enjoy all the rights, privileges, rights of way, franchises and immunities hereinafter mentioned, upon condition that they and their associates shall incorporate themselves under the general laws of the State regulating corporations and providing for the incorporations of bridge companies, and shall adopt the name of Sacramento and Yolo Bridge Company, and shall abide by and fulfill the further conditions hereinafter mentioned.

"Sec. 2. Said company, when incorporated as aforesaid, shall have full power to build, erect, construct and maintain a public [137] tool-bridge across the river Sacramento, at or near the foot of Broad Street, in the city of Sacramento, County of Sacramento, to, or, near the foot of Ann Street, in the town of Washington, Yolo County, and have

and enjoy all rights, privileges and immunities thereunto appertaining, and shall have the right of way across said river, and the privilege of using the same for that purpose, which is hereby granted and ceded to said company for the term of twenty (20) years. Provided, within one year from the date of the passage of this Act the said company shall commence the construction of said bridge, and within two years shall build and fully complete the same; otherwise the right to construct the same shall be forfeited, and this Act become null and void. Said Company shall at all times after its completion keep said bridge in passable order and condition, and shall be responsible for any damage arising to persons or property crossing said bridge, caused by neglect to keep said bridge in proper repair and condition. After the expiration of ten years from the completion of said bridge, the counties of Yolo and Sacramento, or either of them shall have the right to purchase the said bridge, at an appraised value, to be determined by five appraisers, two to be selected by the bridge company, two by the county or counties aforesaid, and one to be selected by the four appraisers herein before provided for; and such value shall be estimated to be the value of the bridge, not including the franchise or right of way. And, provided further, That if the said bridge be purchased by the counties of Yolo and Sacramento, or either of them, then the right to levy and collect tolls shall cease.

"Sec. 3. The said bridge shall be constructed in the best and most approved plan, in a substantial

manner, and of the most durable materials, and shall have a draw or opening of sufficient dimensions, not less than sixty feet wide, as will admit the passage of the largest class steamers plying in or upon said river, to any point of travel above the City of Sacramento; and [138] the said company shall at all times keep said draw or opening in good working condition; and shall also employ not less than two persons, one of whom shall be in constant attendance at said draw or opening, for the purpose of allowing an uninterrupted navigation of the river; and any damage that may accrue by reason of his absence or inattention to the duties as prescribed, shall be at the cost and expense of said bridge owners, to be recovered by an action in any court of competent jurisdiction.

"Sec. 4. The said company, upon the erection and completion of said bridge, shall be authorized and empowered to charge and collect such rates of toll, as the Board of Supervisors of Sacramento County may fix annually. Provided, That the Legislature may at all times modify or change the rates, so fixed by said Board of Supervisors, and may authorize the erection of other bridges across said river, at any point where public convenience may require.

"Sec. 5. Said company may regulate and determine the speed of travel, riding or driving, upon said bridge, and may require the speed not to be faster than a walk, and for each violation may recover judgment, before any competent court, for any damage by said company sustained by such

travel, riding or driving, exceeding the speed authorized by the company.

"Sec. 6. Said company shall keep in some conspicuous place at each end of the bridge, a bulletin board, which shall contain the scale and prices, and notice of speed allowed on said bridge, Provided, That nothing in this Act shall be so construed as to in any way prevent the Board of Supervisors of Sacramento County from granting license to the present Ferry Company, or any other ferry, that the said Board may deem necessary for the convenience of the public."

Also from the Statutes of California, 1967–8:

CHAPTER CCCCXCIV.

"An Act to confer upon the California Pacific Railroad Company, duly incorporated and working under the general railroad laws of the State, certain rights and privileges, [139] (Approved March 30, 1868.)

"The People of the State of California, represented in Senate and Assembly, do enact as follows:

"Section 1. The grant heretofore made to the San Francisco and Marysville Railroad Company by an Act entitled an Act to confer upon the San Francisco, and Marysville Railroad Company incorporated under the laws of this State, certain rights and privileges, approved April twenty-fourth, eighteen hundred and fifty-eight, of one-half mile of water front on the northeast side of Napa Bay or the Straits of Carquinez—which half mile was required to be in one body, and not to inter-

fere with the then existing rights or possessions
any person, and to be designated by the said com
pany by survey and plot—is hereby ratified an
confirmed to the California Pacific Railroad Com
pany, the successor of the said San Francisco an
Marysville Railroad Company.

"Sec. 2. That said incorporated company are here
by authorized and granted the privilege of connect
ing and keeping across the Sacramento River in th
line of their road, at or near the City of Sacramento
and above or north of the present bridge, a railroa
bridge, for the use and benefit of said road; pro
vided, said company shall construct the same wit
a good and sufficient draw of not less than seventy
five feet in width, and so located and constructe
as not to interfere with or impede the navigatio
of said river or to interfere with the bridge no
constructed; nor shall said company ever charg
any tolls whatever upon their said bridge.

"Sec. 3. The said company is further authorize
and granted the privilege of constructing and keep
ing across the Sacramento River, on the line of thei
road, at or near the Town of Knight's Landing
Yolo County, a railroad bridge for the use an
benefit of said road; provided, said company shal
construct the same with a good and sufficient dra
of not less than sixty feet in width, and so locate
and constructed as not to interfere with or imped
the navigation of said river. [140]

"Sec. 4. The provisions of this Act shall not i
any manner affect any legal or equitable claim
now existing on any of the lands hereinbefore de

(Testimony of James O'Neil.)

scribed, in favor of any claimant under the State, nor affect any suit or proceeding which is now pending respecting the same, arising out of any claim now made; but the Courts of the State may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto under any existing law of this State, the provisions of this Act to the contrary notwithstanding.

"Sec. 5. This act shall take effect immediately."

(An adjournment was here taken until Wednesday, December 10, 1919, for the purpose of taking further testimony at Sacramento, California.)

[Endorsed]: Filed Jan. 28, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [141]

Sacramento, California,

Wednesday, December 10, 1919.

Testimony of James O'Neil, for Libelant.

JAMES O'NEIL, called for the libelant, sworn.

Mr. HALL.—Q. Your name is James O'Neil?

A. Yes.

Q. Where do you live, Mr. O'Neil?

A. At the present time I live up here at the Stoccato Ranch.

Q. Near Roseville?

A. About five and a half miles from Roseville.

Q. What is your occupation now?

A. I am ranching, working on the olive orchard. I worked as a bridge builder for years.

Q. You did work as a bridge builder for years?

A. Yes.

(Testimony of James O'Neil.)

Q. Did you ever work on any bridges crossing the Sacramento River near the City of Sacramento?

A. I worked on two of those bridges here.

Q. When did you commence to work on the first bridge?

A. The first bridge that I worked on around Sacramento was in 1863.

Q. 1863? A. Yes.

Q. And worked as a carpenter? A. Yes.

Q. How long before that had you known that bridge?

A. I had been across it—the boys in Washington used to go back and forth most every day, from '60 up to that time.

Q. What sort of a bridge was it? What were they using it for from 1860 on, as long as you knew it?

A. Used it for a wagon and railroad bridge.

Q. When you went to work on it in 1863, what railroad company or person were you working for?

A. I was worked for R. N. Doyle, foreman.

Q. And what railroad company was it?

A. Well, it was the S. P., I suppose; they all were under the Southern Pacific at that time.

Q. All under the Southern Pacific at that time?

A. Yes, so [142] they were supposed to be.

Q. Do you know yourself, what branch of the Southern Pacific, or what line that was called?

A. It was called, before the S. P. got it, the California Pacific.

Q. The California Pacific? A. Yes.

(Testimony of James O'Neill.)

Q. What did you do on that bridge when you first went to work on it?

A. I was working on the outer pier, on the down pier, the first time I went to work on it.

Q. Just repairing it?

A. Just repairing it.

Q. Was there any other bridge on the river at that time?

A. No, there was none over there at all in '91 or '92—the Colusa Bridge, that was the nearest one to it.

Q. Do you know when this bridge was built, the one that you first worked on?

A. I could not swear to that, but I think it was around the early '90's, or '78 or '79, somewhere along there; I went across it once when they were working on it. That is the reason my attention was called to it.

Q. When they were building that bridge, you went across there?

A. Yes; they were just driving piles when I was there.

Q. Was there a bridge there when they were building this '78 bridge?

A. Yes, there was an old bridge there.

Q. Did you ever work on that bridge? A. No.

Q. Did you know it before they tore it down?

A. I didn't pay much attention to the bridge; it was quite an old, weakly-looking bridge; I know it was nothing like the present bridge.

(Testimony of James O'Neil.)

Q. Were they using it for a railroad bridge, the old one?

A. I think there were rails laid on that.

Q. How many different times did you work on this bridge that you commenced to work on in 1883?

A. I worked on that in 1883 and then again in 1885, I think. Let me see. I went to work with Doyle in 1885. What time was that railroad strike on?

Q. '94—you mean the big Chicago strike?

A. Yes; in 1893, it was.

Q. In 1893 you worked on it? A. Yes. [143]

Q. Did you work on the new bridge that they built in 1895? A. Yes.

Q. Were you about Sacramento when they tore down this old 1878 bridge?

A. No, I was not here; I was in Fresno when they tore down the old one, of the California Pacific, or supposed to be; when they got through with the bridge, the new bridge we called it then—when we got the bridge finished, they had not started to tear down the old bridge; they had it finished and trains running over it before they tore down the old bridge.

Q. That was in 1895 you went down to Fresno County?

A. I did not go to Fresno County at that time; I think I went north, up the Redding way. If I had somebody that worked with me I could recall all these things better.

(Testimony of James O'Neil.)

Q. We will talk about the first bridge that you knew when you came here in 1876—that was, I believe, when you came to California? A. Yes.

Q. We will call that the '69 bridge. Were you there when it was torn down?

A. No, I was not around Sacramento at all then.

Q. Did you at any time after 1883 know of them repairing this 1878 bridge, the one that you worked on?

A. They repaired it, I think, in 1893 again.

Q. What did they do to it in 1893, do you remember?

A. They took out all the braces and left the top work standing, the top chords, left them all standing, and took out the bottom chords, and replaced new chords in there.

Q. Did they drive any new piling in that bridge?

A. No, only false work.

Q. They put false work under these different spans across the river?

A. Yes, about every panel.

Q. Did they drive any piling under these panels and false work to hold them up?

A. Yes, sure; that is all the trains were running on until they put in the new chords.

Q. What did they do when they put in the new chords? What did they do with the false work and the piles that had been driven underneath it?

A. I think they pulled the biggest [144] portion of that, except some that were nearer the piers.

Q. What did they do with them?

(Testimony of James O'Neil.)

A. I think they were broken off; they drew and hauled them and pulled them over until they broke off; I think some of them, a good many of them, they pulled.

Q. Was this bridge that was built in 1878, the one that you worked on in 1883, was it built upstream or downstream from the old original bridge that you knew of? A. Upstream.

Q. About how far upstream from the 1878 bridge?

A. They had planks, timbers, laying from one to the other, to walk on in places.

Q. They were right close together?

A. From one pier to the other, from the old bridge to where they were working on the piers of the new bridge, I don't know as there was more than one or two braces, as we call them, but I am sure they crossed from the old bridge.

Q. You did not work on the 1878 bridge when they were building it? A. No.

Q. But you knew it at that time?

A. I knew the men that were working on it at that time and I have known them since.

Q. Were there trains running over the old bridge while they were building the 1878 bridge?

A. I couldn't tell you whether trains were running right at that time, or not.

Q. Had they been running back and forth over the old bridge?

A. They were supposed to run there, the rails were on it.

Q. How did you get your pay when you were

(Testimony of James O'Neil.)

working on the 1878 bridge in 1883?

A. I got my pay for working on there, I drew it at Yuma, got it in cash.

Q. Yuma, Arizona?

A. Yes; I went from here down there.

Q. Do you know what company it was that gave you those checks?

A. It was generally called the P. I. Company, the Pacific Improvement Company.

Q. The Pacific Improvement Company was paying you?

A. Yes, they used to call it the P. I. Company; that is what [145] it was supposed to be; they were doing pretty near all the building work at that time, grading and bridging.

Q. You don't know anything, of course, about the arrangement, how they happened to pay you?

A. Well, the pay car came along; we left here between pay days; I had been working here, and we were sent to Yuma the time the bridge burned down there, and I had my pay down there.

Q. You were working for the Southern Pacific during all of this time, were you not? A. Yes.

Q. Where did you usually draw your pay?

A. I generally drew it out of the pay car they had along the road. I worked for them in Fresno County before I went to Sacramento; I worked on a bridge on the San Joaquin.

Q. Was that a Southern Pacific pay car, or was it a P. I. pay car?

A. Supposed to be Southern Pacific; Hanford

(Testimony of James O'Neil.)

was paymaster at that time.

Q. You have been down this morning with Mr. Boyd to look over the site of the bridge?

A. Yes.

Q. Do you recognize those old piers down there in the river?

A. It is pretty hard to recognize them, but I know they are located right where the old bridge went across.

Q. You recognize the end of the Pioneer Mill, on the Sacramento side there?

A. Yes, there at the Pioneer Mill there used to be a little pumping station, on the downstream side.

Q. You think that pier is about the same location with reference to Ann Street over on the Yolo County side?

A. Yes, it looks like it, as near as a man can judge.

Q. Do you remember whether or not in 1893, when you worked on that 1878 bridge, that they shortened the spans?

A. Well, not while I was there; there was a crib put in from the end, there was a crib pier put under it, but I could not tell whether they put piles under it after we left; it was not all finished when we went to Yuma; a man by the name of Charles Jobe took the place of Doyle and finished it up. [146]

Q. Before you went to Yuma had they commenced to put in any cluster of piles around the old piers?

A. No.

(Testimony of James O'Neil.)

Q. The pile-driver was not working there before you went to Yuma?

A. No, only to drive the false work.

Q. Put false work on the bed of the stream?

A. Yes.

Q. They were not working on the piers at all while you were there?

A. They were working in 1893, they were working on the center pier; I was putting on 8 by 12 planking, up on the side of the piling.

Q. Up the side of the piling?

A. Yes, to keep the boats out of the piling.

Q. Did you know Mr. A. A. McKeon?

A. I worked for him four or five different times.

Q. He was your boss or foreman?

A. On both of them bridges he was foreman, had four men under him.

Q. You mentioned to me this morning a man in Oakland; what was his name?

A. Billie Greaves.

Q. He worked on what bridge?

A. He worked on the first original bridge that they put in, the '78 bridge; he was working on the pile driver, and if Dam was here he could tell you he worked for his father.

Mr. HALL.—That is all.

Cross-examination.

Mr. FORD.—Q. You say, Mr. O'Neil, you came to California in 1876? A. 1876.

Q. What part of California did you come to?

A. I came to Fresno County.

(Testimony of James O'Neil.)

Q. When were you first around Sacramento?

A. Well, I was here to California in 1876, and I was here the next year; I came here in March.

Q. When did you first pay any particular attention to the bridge crossing the river?

A. When I walked across it when [147] they were putting up that bridge.

Q. They were putting up the bridge then?

A. Yes.

Q. You mean the 1878 bridge?

A. I was down here from Fresno for doctor's treatment, and I went across over there, across to Yolo and looked around; I was here, I think, about five or six days.

Q. You walked across the old bridge then?

A. Yes.

Q. This 1878 bridge was being put up just upstream from it? A. Yes.

Q. You say close to it?

A. Well it was, I should judge, probably as far as from here to the door, or so, probably a little further.

Q. That is, the piers were in but not—

A. (Intg.) The structure that would carry the bridge; there was quite a little space between the bridges; I had to put planks across to walk on.

Q. You say you were over there this morning?

A. Yes.

Q. Did you notice on the Yolo side how the piling, for instance, take these piers in the 1878 bridge—how they fitted right into the piling on the bridge just downstream from it, that they met there at the bot-

(Testimony of James O'Neil.)

tom—did you notice that on the Yolo side?

A. I did not notice; I did not pay any particular attention to it this morning, but they always drive this piling—they drive on what they call a batter.

Q. You noticed down where the piles were exposed that the piling in what we refer to as the 1878 bridge meets the piling of the bridge that was just downstream from it?

A. Yes, they stand on a batter, which makes them so much wider apart at the top than at the bottom, three feet in every twelve in each one—3 by 12 batters on the outside, and then center piles stand plum; those are driven downstream, sloping three feet toward the top every twelve feet.

Q. As I understand you, you have a distinct recollection that in 1878, or whenever it was this new bridge was being [148] built, that there was another bridge just downstream and alongside it?

A. Yes.

Q. And afterwards you worked on this new bridge that was being constructed at the time you were here in 1878? A. Yes, I worked on that.

Q. The other bridge had disappeared, had it, in the meantime? A. Yes.

Q. You don't know what became of it, but it was there no more? A. Yes.

Q. This bridge that you saw being built there in 1878 and which you worked on in 1883, carried railroad trains?

A. I am pretty sure it did, because I walked across it.

(Testimony of James O'Neil.)

Q. I am referring now to the bridge you worked on in 1883,—that carried railroad trains?

A. Oh, yes.

Q. But this bridge, the one that you walked across, you say you think carried railroad trains?

A. I could not swear that it did, but I think it did.

Q. You spoke a while ago about being paid for this work that you did there by the P. I. Company.

A. That was what was supposed to be the P. I. Company.

Q. Afterwards, on Mr. Hall sort of straightening you *you*, you indicated you were paid by the Southern Pacific.

A. We were all supposed to be working for the Southern Pacific, but it was under the name of the P. I.

Q. You don't know of your own knowledge, except that you were paid by the P. I. Company?

A. We were paid on the S. P. pay cars.

Q. Do you remember anything about the checks—were you paid in cash? A. In cash.

Q. Why do you say you were paid by the P. I. Company?

A. I was paid out of the pay car at Yuma for this work that I did here.

Q. This work that the P. I. Company did, they always paid you out of the pay car?

A. I always got my pay out of the pay [149] car until they started paying in checks.

Q. When were you first paid by check?

A. I was working in Oakland on Long Wharf, I

(Testimony of James O'Neil.)

think it was in either 1887 or 1888—1887, I think.

Q. When you were working here on this bridge in 1883, you don't know whether that was, or do you know whether that was work that was being done by the P. I. Company, or work that was being done by the California Pacific Railroad, or Southern Pacific—you don't know?

A. No, we were paid by the Southern Pacific; I was paid out of the pay car.

Q. You were paid out of the pay car. If the Southern Pacific was operating the road, that would be the Southern Pacific pay car, evidently.

A. Supposed to be.

Q. But do you know who was paying you the money, whether the P. I. Company, or California Pacific Railroad Company, or the Southern Pacific Company?

A. I never bothered my head about that.

Q. You don't know whether the repairs were being done by the P. I. Company under contract, or whether the California Pacific Company was doing the repairs, or the Southern Pacific Company, do you?

A. No, I know only who paid us; that is all I know.

Q. The only way you know who paid you is you were paid out of the pay car? A. Yes.

Q. You were paid in cash, were you? A. Yes.

Q. Why did you say to Mr. Hall that you were paid by the P. I. Company?

A. The P. I. Company was supposed to do all that work; they were doing all construction work; they were the company that done all the construction

(Testimony of James O'Neil.)

work; they used to do all the grading, pretty much all; Mr. Trowbridge was supposed to be at the head of it, and A. Brown was supposed to be at the head of the Bridge and Building Department of the P. I., and he was the one that was generally out overlooking all of this work, him or some of his engineers.

Q. Did you work under Mr. Brown or Mr. Trowbridge? [150]

A. We were under the engineers and foremen under them; they were at the head of all the engineers and foremen or superintendent.

Q. So far as you knew, the work you were doing was done under the P. I. Company?

A. It was supposed to be; yes.

Q. You don't know whether the P. I. Company was doing the work here for the Southern Pacific, for the California Pacific Company, or who—you don't know of your own knowledge?

A. No, not of my own knowledge, I don't know who was doing it.

Q. Now, you say that there was one time when you did some work here, when there was some piling driven in the river.

A. That was in 1893.

Q. That was when you were boarding up?

A. No, that was when we were putting in the new bottom chords clear through, and left the top part of the bridge standing on false work—took out the bottom chords and put in new ones, and then put the braces up.

Q. That was repair work on the 1878 bridge, then?

(Testimony of James O'Neil.)

A. Yes.

Q. You say there was some piling driven at that time?

A. No piling across, but to hold the bridge up; there was no other way to hold it.

Q. Where was that piling driven?

A. The pile-driver went along each side and drove them down and put a cap on just underneath the bridge.

Q. Do you know who you were working for at that time, in 1883? Do you know who was doing the work?

A. No, that is what I told you—I was paid in cash out of the pay car.

Q. Do you know whether the P. I. Company or one of the railroad companies was doing the work there?

A. I could not tell; there was no check, nothing to tell you; when you went up there, you called your name and your money was handed out.

Q. Let me ask you with reference to this piling, that was driven there when you were doing this repair work in 1893. Did you see it taken out?

A. No, I did not see it all taken out, a [151] part.

Q. You saw some of it taken out?

A. Yes.

Q. How did they take it out?

A. The pile-driver hooked on, and what they could not pull up, they would drop the pile-driver back and pull sidewise to loosen it, and then pull

(Testimony of James O'Neil.)

up; if it broke off or all came up I don't know.

Q. You don't know?

A. No. If Grays was here he could tell you more about it than I could, because he was on the pile-driver; Mr. Dam could tell you, I guess; he ought to; his father was the pile-driver.

Q. You say there was no bridge near Sacramento than the Colusa Bridge when you were working there in 1883?

A. None unless that old dry dock bridge was at Knight's Landing; I don't know whether that was pulled out at that time, or not; there was none between here and there.

Q. There had been one at Knight's Landing?

A. Yes.

Q. That was built across before you came here?

A. Before I was ever up in that country.

Q. That is what I had in mind, that Knight's Landing bridge.

A. There was a bridge there, that was called the Ri*deot* Bridge, that went over to Marysville. Mr. Dam could tell you more about that, I believe he helped to pull it out.

Mr. FORD.—That is all.

Redirect Examination.

Mr. HALL.—Q. Mr. O'Neill, where would this pay car be that you were paid out of?

A. When they paid in Sacramento it stood up here right near the depot.

Q. Right near the Southern Pacific Company depot? A. On the other side of this depot.

(Testimony of James O'Neil.)

Q. That is the real old depot that is down here now? A. Rigth in that yard.

Q. Were there any names or lettering on the engines in those days?

A. Ninety-six was the engine that drew the pay car.

Q. Do you know whether there was any name of any railroad company or anything of that sort on it?

A. Well, I don't know; [152] I don't really remember whether there was any let*ting* or words on it or not, but I know the engine was No. 96; I remember that because I saw it working on a work train afterwards.

Q. What company did you think you were doing this work for?

A. Well, we were always supposed to be in the P. I., that is what they all called it, supposed to be.

Q. What railroad company was using the roadbed that you were doing this work on?

A. The Southern Pacific.

Q. Those were all considered and known by everybody in those days as Southern Pacific Railroads? A. Yes, it was here.

Mr. HALL.—That is all.

Mr. FORD.—That is all.

Mr. HALL.—Mr. Ford, I desire to have the record show that the libelant offers in evidence the plats which have been marked 2A and 2B; those are offered as illustrative of the testimony given by the witnesses.

Mr. FORD.—For no other purpose?

Mr. HALL.—Of course, I offer them to substantiate such testimony as has been given by the witnesses who have been sworn, and as a reproduction of Libelant's Exhibit 1, which was the map from the War Department.

Mr. FORD.—There is no objection to the maps being introduced in evidence as illustrative. Now, as to their being introduced for any other purpose than as illustrating the testimony given, I want to make the objection that they are immaterial, irrelevant and incompetent.

Mr. HALL.—May I ask you, Mr. Ford, if you have any record of the Northern Railroad, or any contracts between the California Pacific Railroad or the Southern Pacific Company and the Northern Railroad?

Mr. FORD.—I have no doubt that we have. I did not pay any attention to that, but I noticed in that record which we have [153] produced the other day the Northern Railroad Company is mentioned in the contracts.

Mr. HALL.—Are you willing at this time to stipulate that the record may show that the Southern Pacific or the California Pacific, or both, were in charge of the operation and control of the line of railroad known as the Northern Railroad?

Mr. FORD.—I am not in a position to stipulate at this time. I think that the record there will show what the fact is, that book that I produced with the agreement between the California and the Southern Pacific; as I understand it, that lease

which you put in evidence from the California Pacific to the Southern Pacific succeeded all previous agreements.

Mr. HALL.—May we consider if there were previous agreements in that record that they are in evidence in this case?

Mr. FORD.—I want to see them first.

Mr. HALL.—I desire to have this certified copy of the minutes of the Board of Sacramento County offered in evidence and marked as Libelant's Exhibit 11.

Mr. FORD.—I want to make the objection to each of the records separately, that is, to each of the proceedings separately that are set forth in this certified copy, that it is immaterial, irrelevant and incompetent, and hearsay. I may withdraw the objection later, after I have had time to investigate the matter.

Mr. HALL.—Now, Mr. Ford, I desire to offer in evidence certified copies of the minutes of the Supervisors of Yolo County, which refer to an order of February 8, 1878, and the order of December 6, 1893—I don't know that the latter order has so much bearing on this case.

Mr. FORD.—The same objection to these as to the other, and I will examine them afterwards.

Mr. HALL.—I ask that that be marked Libelant's Exhibit [154] 12. I desire to offer in evidence by reference, if counsel will permit such a procedure, the record in the case of the County of Sacramento vs. Southern Pacific Company and California Pacific Company, which was case No. 586

(Sacramento), Volume 2972, in the California Supreme Court records. This being the record on appeal in the case above named, the decision in which is reported in Volume 127 of the Supreme Court of the State of California, page 217, *et seq.* Mr. Ford, for your enlightenment, I desire to say that this is offered particularly for the admissions and stipulations made by counsel in one place, the page of which I have not now—it was the agreement between counsel for the respective parties that the construction of the new bridge was commenced on the 15th day of July, 1895. I also desire such benefit as I may be entitled to or may have from the testimony of one R. H. Barkingham, who is now deceased, whose testimony is incorporated in the record, and also the testimony of J. D. Isaacs, that is found on page 89 of the transcript. There is also an admission by counsel for the defendants in that case as follows: "It was here admitted that from May 8, 1878, until the construction of the new bridge in 1895, there was only one railroad bridge across the Sacramento River in front of the city of Sacramento." I desire also to call special attention and reference to the findings of fact made by the Trial Court in the case referred to and found, commencing on page 47 of the transcript of the record referred to.

Mr. FORD.—There will be no objection so far as the offering being made by reference is concerned, but I would like, when it is convenient, when we get the record, for you to dictate into the record such portions as you want to refer to, be-

cause there is no necessity, as I take it, to incorporate the whole record.

Mr. HALL.—No.

Mr. FORD.—With those two understandings, I want to object to each of the matters offered, upon the ground [155] that they are immaterial, irrelevant and incompetent and hearsay, and not binding upon either of the defendants in this proceeding. After I have examined them I may withdraw the objection.

Mr. HALL.—Let all objections except objections as to the form of the question be reserved until the reading of the testimony by the Court. I have over in the auditor's office investigated the assessment-rolls of the county from 1858 until 1878, which shows that this bridge down here was assessed to the Sacramento & Yolo Bridge Company until 1878. I do not want to put all these assessment-rolls in, and will be glad to go with you and examine them and have you stipulate about them.

Mr. FORD.—I will be glad to do that. That was my understanding that the bridge or bridges were assessed until 1878, when this new bridge was built. So far as the assessment being offered by reference is concerned, there will be no objection, and I will take your statement rather than have the records themselves offered in evidence; but aside from that, it is objected to upon the ground it is immaterial, and irrelevant, hearsay, and not binding upon either defendants. As to that objection, after I have investigated it I may withdraw it.

(A recess was here taken until one-thirty o'clock P. M.) [156]

AFTERNOON SESSION.

Testimony of William H. Dam, for Libelant.

WILLIAM H. DAM, called for the libelant, sworn.

Mr. HALL.—Q. Your name is William H. Dam?

A. Yes.

Q. Where do you live?

A. My home is in Oakland.

Q. You are employed by the Ajax Dredging Company, I believe?

A. For the Ajax Dredging Company.

Q. That is an allied corporation of the libelant, the Olympia Dredge Company?

A. I don't know what they are allied with.

Q. Mr. Cooper and Mr. Palmer are the main officials of the Ajax Company, are they not?

A. The only man that I come in contact with there is Mr. Brown; he is the only man I know anything about.

Q. So that there may be no misunderstanding about it, I want the record to show that Mr. Dam is employed by the Ajax Dredging Company, which is an allied and interlocking incorporation with the libelant, the Olympia Dredge Company. Mr. Dam, were you ever employed upon the repair or construction of any bridges across the Sacramento River at or near the city of Sacramento?

A. I was.

Q. When were you first employed?

A. My first employment, I judge, on the Sacra-

(Testimony of William H. Dam.)

mento River was either in 1876 or 1877, as I have forgotten which; I cannot remember.

Q. Did you know of a bridge, a new bridge being erected across the Sacramento River shortly after that time? A. Yes, I worked on it.

Q. That was known as the 1878 bridge, was it not? A. I believe so.

Q. Now, when you commenced work on the bridge, the first bridge you worked on, that was in 1876 or 1877?

A. Somewhere in that neighborhood.

Q. By whom were you employed at that time?

A. Well, [157] I suppose the S. P. Company; it might have been the P. I. Company.

Q. What were you employed in doing about that bridge?

A. I was firing a donkey-engine at that time.

Q. A donkey-engine was running a pile driver?

A. That was on the pile-driver.

Mr. FORD.—Let me suggest at this time that the S. P. Company was not incorporated until long after that.

A. The C. P. it was at that time; I beg your pardon.

Mr. HALL.—Q. What was the full name of it?

A. Central Pacific Railroad Company.

Q. Did you know of the California Pacific?

A. Yes, the California Pacific also.

Q. How were you paid?

A. We were paid by the day—do you mean the monthly pay days?

(Testimony of William H. Dam.)

Q. Where did you get your pay?

A. At that time?

Q. Yes. A. I think it was $2.25 a day.

Q. No, where were you paid, and in what way, by check or cash? A. I was paid cash.

Q. Where did you go to get your cash?

A. I think we got it out of a pay car.

Q. On the railroad here at Sacramento?

A. Wherever we happened to be on the line.

Q. What did you do about that bridge in 1876 or 1877?

A. Well, the bridge was very rotten, and they had to either renew the chords or shorten the spans, so that they took the method of shortening the spans, which they did by driving nine-pile clusters on each side of the piers at the second panel points from the bearing on the pier, and shoving up the spans the width of four panel points—if these panel points were 10 they were shortened 20, if 12 they were shortened 24 on each end; by shortening the spans you increase the strength; that is what that job was for, simply to prolong the life of the bridge.

Q. Had you known that bridge before you went to work on it, [158] to do this work?

A. I had known it simply by passing over it on a passenger train.

Q. How early did you pass over that on a passenger train?

A. I suppose a year or so before that time.

(Testimony of William H. Dam.)

Q. What time did you come to the State of California? A. In 1868.

Q. Was it a railroad bridge at that time?

A. Well, there was a railroad bridge when the Cal. P. was there—I couldn't say as to that—the bridge was there, certainly.

Q. Were you working on the construction of the new 1878 bridge? A. I certainly was.

Q. In what capacity?

A. I was running a donkey-engine.

Q. On the pile-driver? A. Yes.

Q. Have you recently been down to the scene of these bridges on the river here? A. I have.

Q. Have you seen the old abutments that are over on the Yolo side, or the pier-heads? A. Yes.

Q. Can you tell us whether or not, from your memory, those abutments and pier-heads are practically in the same place as you recollect, by having erected the 1878 bridge? A. Exactly.

Q. Were you there when the old 1869 bridge, we will call it, the first bridge you were working on, was destroyed or taken down? A. Oh, no.

Q. Now, we are calling the first bridge that you worked on—you say you worked on the '66 or '67—we will call that the '69 bridge. A. Yes.

Q. You built the 1878 bridge in 1878?

A. Yes.

Q. Were you there when the old '69 bridge was torn down?

A. Certainly, I helped to tear it down.

Q. For whom were you working at that time?

(Testimony of William H. Dam.)

A. My father was foreman.

Q. What railroad corporation, if any, or what company? A. Pacific Improvement. [159]

Q. Were you getting your pay from the pay car?

A. From the pay car, yes.

Q. What was done with the material that came out of the old bridge?

A. There was a great deal of it, I think, sold for firewood, if not all.

Q. Sold for firewood? A. I believe so.

Q. Were the railroad trains running across it up to the time it was destroyed?

A. They were running until we had a new bridge ready for the traffic.

Q. Was the '78 bridge then used by the railroad?

A. Up to the time that we had the new bridge ready to switch them onto, yes.

Q. Then they were switched over to the new 1878 bridge?

A. Yes, then we started to tear the old one down right away.

Q. With reference to the old 1869 bridge, where was the new 1878 bridge located?

A. The north side.

Q. Upstream? A. Yes.

Q. About how far was the distance between the two bridges?

A. As close as we could build them, practically; in fact, I think the draw-piers intersected.

Q. Is it not a fact, to refresh your memory, that they started from the Yolo side from practically

(Testimony of William H. Dam.)

the same point, but that on the Sacramento side there was a little greater distance between the two bridges? A. Yes.

Q. So that after you passed the middle of the stream they were a little farther apart than they were toward the Yolo side?

A. Well, they were farther apart on the Sacramento side.

Q. That is what I mean. Do you remember the length of those spans on the 1878 bridge?

A. I do not. I had an idea they were 150 feet, but I would not want to say; they were from 100 to 150.

Q. How long did you continue to know the 1878 bridge?

A. Up to about a year or two previous to its being taken down.

Q. How frequently did you work on it?

A. I don't know; I [160] worked on that previous to that time, we put in some new chords.

Q. In the reconstruction of the 1878 bridge did you drive any piling in the river at any other place than where the ends of the spans came?

A. In the 1878 bridge?

Q. Yes.

A. Yes, we drove some piles on that.

Q. When was it that you drove these extra piles and shortened the span of the 1878 bridge?

A. I think it was about a couple of years before it was removed.

Q. Will you explain in your own way how you

(Testimony of William H. Dam.)

shortened the spans and what you did.

A. Just the same as previously, we drove nine-pile clusters, at the second panel points on the piers, both ends of the spans, reducing the length of the bridge four panel points.

Q. Was this piling driven straight, or battered?

A. They were battered.

Q. Were the tops of those left on the batter, or were they drawn together afterwards?

A. Drawn together.

Q. What spans did you do that? How many of the spans did you perform that operation at? Was it all of them or just part of them?

A. I forget whether we did it to all of them, or not.

Q. Did you do that to the center of the draw-bridge? A. We did it on this side.

Q. On the Sacramento side?

A. To this side of the draw; whether we did on the other side, or not, I have forgotten.

Q. Were you there when the 1878 bridge was torn down? A. Yes.

Q. You say they took the piling out of the old 1878 bridge when they tore it down?

A. Tore it down and broke them; we had to drive false piling in order to break it down.

Q. When you came to tear down the 1878 bridge, how did you take the piles out of the river?

A. Broke them.

Q. By the donkey-engine pulling them?

A. Yes, sure, putting a rope around them.

(Testimony of William H. Dam.)

Q. Were those broken with reference to the water that was in [161] the channel, or did you—

A. (Intg.) They were broken; we had to see that they were below the sand.

Q. Did you assist in the destruction of the 1878 bridge in 1896? A. No.

Q. You were not here when that was destroyed?

A. I was not here, no.

Q. Who were you working for in these later years when you repaired and put in this extra piling on the 1878 bridge?

A. You mean previous to its being taken down?

Q. Yes. A. I was running a gang myself.

Q. What company were you working for?

A. Working for the S. P. Co. or P. I. Co., or whatever it was at this time.

Q. I mean the repair work that you did along about 1893, who were you working for then?

A. The S. P. then.

Q. By S. P. you mean the Southern Pacific?

A. The Southern Pacific.

Q. At that time you were a foreman in charge of a gang? A. Yes.

Q. Can you fix about the year it was that you put in this extra piling and shortened the spans of the 1878 bridge?

A. I think it was about two years previous to its removal.

Q. About two years? A. I think so.

Q. Do you remember the railroad strike that we had along about that time, in those years?

(Testimony of William H. Dam.)

A. The railroad strike?

Q. The railroad strike known as the Chicago strike, do you remember when that was?

A. 1894.

Q. When was it with relation to that that you fixed these piers on the 1878 bridge?

A. I think it was a year and a half or two years previous.

Q. Now, when you were constructing the 1878 bridge, did you drive piling all across the river for false work? A. We certainly did. [162]

Q. When the bridge was built, what became of this piling that were driven for the false work?

A. Broke them off.

Q. Broke them off? A. Yes.

Q. About what length of piling were used in the 1869 bridge when you repaired and shortened the spans? A. Seventy feet.

Q. How deep would you drive them into the ground? A. I should imagine 35 or 40 feet.

Q. In the 1878 bridge what was the length of the piling? A. For the re-enforcing work?

Q. Yes. A. The same depth.

Q. For the original bridge, what was the length?

A. You mean for the main piers?

Q. Yes. A. They ran from 70 to 80 feet.

Q. How deep were they driven?

A. I suppose they got a 50-foot penetration.

Q. And for the additional piers that you put in in 1892, they penetrated down about 20 or 30 feet?

A. Thirty-five or forty feet; they drove them very

(Testimony of William H. Dam.)

hard; they were 70-foot piles, 65-foot or 70.

Q. In the erection or repair of the 1878 bridge did you use any square piling?

A. Yes, square piles for piers.

Q. Was that the original piers in the original erection or the repair work in 1892?

A. No, in the erection.

Q. In the erection did you use some square piles?

A. As I remember, all the pier piles were square piles.

Mr. HALL.—That is all.

Cross-examination.

Mr. FORD.—Q. When you did this work on the old bridge that was there, when you first knew of any bridge across the Sacramento River, in shortening the spans so as to strengthen the bridge, you say that those spans were driven 20 or 24 feet out from the original piers?

A. Yes, on either side.

Q. Where are those piling now with reference to the river bank, on either side of the river?

A. There is one set of those piers that shows there right at the westerly edge of the water. [163]

Q. Right at the edge of the water?

A. And the pier proper was just the other side of it.

Q. With reference to the river bank, now, whether it is on the bank, or whether out in the water from the bank.

A. Out in the water a little bit.

(Testimony of William H. Dam.)

Q. On the Yolo or Sacramento side?

A. On the Sacramento side; I did not see it on the Yolo side.

Q. What is there on that Yolo side that is on the edge of the water?

A. Those are piers, they had crib piers there.

Q. If they were new piles driven to shorten the span there, how far out from those piers would they be? A. They would be from 20 to 24 feet.

Q. But as I understand you, on the Sacramento side, the piling that shows there right at the edge of the *year* was this new piling driven to shorten the spans?

A. Yes; that was out of the way of navigation or driftwood, and there was never any trouble taken to remove it.

Q. Now, then, later on, when you worked on the construction of this 1878 bridge, you say that the old bridge was torn out down below the sandbar of the river. Did I understand that?

A. Spans were torn out.

Q. You did not see that old bridge built; you don't know when it was built, do you?

A. I don't know anything about it.

Q. What about this false work that was used there? You say this piling was broken off?

A. Yes.

Q. Were they broken off the same way?

A. Broken off; the instructions were to break them off, break them to clear the sand.

Q. Did you do that?

(Testimony of William H. Dam.)

A. They broke there naturally.

Q. You have had lots of experience breaking piling off, have you? A. Yes.

Q. What does piling naturally do in breaking it off?

A. It will naturally break two or three feet below the bottom.

Q. That is, when driven through sand, it breaks off when you [164] get down to near hard ground?

A. It will break a little bit under the ground.

Q. A little bit under the hard ground?

A. The surface, you take it in mud, maybe it will break five or six feet in the mud; very seldom it breaks above the line of the bottom, whatever it is.

Q. You have had lots of experience in breaking piles off?

A. I have broken a few thousand of them, I guess.

Q. From your experience you have found that they will break three or four feet or more under the ground?

A. It is according to the nature of the ground; they will break below the level.

Q. In ground such as is found in the Sacramento River and in this locality, what would it be?

A. That would be the effect here, break below the bottom, providing the pile was the same nature all the way down, no defects in it. If you took an axe and cut it above that level it would break there.

Q. If there happened to be a knot?

(Testimony of William H. Dam.)

A. An axe cut, or something like that.

Q. In the case of the piling that is driven there, might there be a cut that would cause it to break above? A. I don't know as I ever saw it happen.

Q. Your experience has been that with a piling that was strong enough to withstand the pile driving, hammering down, ordinarily, at least, it will break below the surface or below the bottom of the river, as you have stated?

A. It will in breaking off.

Q. You say you came here in 1868? A. Yes.

Q. You have a recollection about the trains, these little trains that they operated at that time, running over that bridge? A. Yes.

Q. Do you remember about the ties and rails that were put on the bridge?

A. Yes, those old share rails, iron share rails.

Q. What is a share rail?

A. A piece of iron about four inches wide with two ribs on each side and the rail reaves into it. [165]

Q. Do you remember about the ties, how the ties were laid on that bridge?

A. The ties on that bridge, on the wagon bridge?

A. I don't know. I think that the rail there lay right on the stringer; that is the usual custom. I cannot remember exactly how that was.

Q. Anyway, the wagons and trains operated over the same level at that time? A. They did.

Q. Was the wagon road on either side of that railroad track, or did they have some space?

(Testimony of William H. Dam.)

A. It was all one; a wagon could run in between the tracks, or wherever they liked.

Q. Now, this '78 bridge, what about it, the one that was built with the rails on?

A. That was a wagon bridge also.

Q. It was operated for both wagons and trains?

A. Yes.

Q. Did they run on the same level?

A. The same level.

Q. Did they occupy the same portion of the bridge, or separate portions?

A. The same portion.

Q. That bridge remained there until 1895 or 1896? A. 1895, yes.

Q. We all have some recollection about it; that is, we all have the same chance to remember it.

Q. Your recollection of that is that the wagons and trains occupied the same portion of the bridge?

A. Yes.

Q. You worked for the railroad company up to what period? A. 1906.

Q. Up to 1906? A. Yes.

Q. Now, with reference to this shortening of the spans in the 1878 bridge, the work that you did just before the '94 bridge, we will say 1893, if that is near enough, or 1892, where were those piles driven with reference to the pier-heads, about the same distance, 20 or 24 feet out? A. Yes.

Q. Where do those piles rest now on the ground, are they close in to the bank the same as the ones that you drove in the old bridge?

(Testimony of William H. Dam.)

A. No, the piers were in a different location.

Q. Where were the piers of the 1878 bridge?

A. The piers?

Q. That is, the bridge you worked on in 1878, the new bridge [166] that you built?

A. The new bridge, you can see the abutment span there, and about 150 feet from that will be the shore span; the piles that we drove there would not be up with the piles that were driven in the original bridge, because the spans were in a different position.

Q. You say the abutment spans there; where are the abutment spans?

A. The span on the Sacramento side, as the old pier shows there now.

Q. Where?

A. Right under that wharf, under the Pioneer mill.

Q. How far out from that?

A. The first pier from that?

Q. Now, how far out from that abutment span were these piles that you drove to shorten the spans on the 1878 bridge, that is the one you built in 1893 or 1894?

A. They would be 20 or 24 feet from the pier.

Q. Wherever the pier was?

A. Wherever the pier was.

Q. Where was the pier?

A. Well, it was either 100 or 150 feet from that abutment that stands there now; that would be your first pier; then you have another span to the right.

(Testimony of William H. Dam.)

I don't know whether the other span was as long as that span.

Q. But on this old bridge, the one you worked on in the '70's and did the work of shortening the spans, that piling was driven in next to the bank?

A. Yes.

Q. Were there any pier-heads out in the stream for that?

A. Yes, sure there were pier-heads.

Q. But there was no work done to strengthen those out there?

A. Yes, we strengthened them all.

Q. You strengthened all of them? A. Yes.

Q. Where was this piling driven?

A. Driven in the same relation to the pier that I have told you before.

Q. So that there was piling driven out in the stream in both instances to shorten the spans?

A. All of these spans.

Q. In both bridges?

A. On the Yolo side and the Sacramento side. [167]

Q. Now, these square piles that you mentioned, tell me again in what connection those square piles were used. They were square piles?

A. Square piles, yes.

Q. Driven? A. Driven through the piers.

Q. Were those driven in the 1878 bridge, the new bridge? A. Yes.

Q. Where—right in the pier-heads?

A. In the piers.

(Testimony of William H. Dam.)

Q. In which piers were the square piles driven?

A. These.

Q. Was the piling all square piles that was driven in that 1878 bridge?

A. No, I don't think they were all square piles, but these main piers were, the draw-pier was, and the landing pier for the end of the draw; those three I am positive of.

Q. How many square piles were driven? Were they in clusters, the square piles?

A. In the landing piers they were in big clusters.

Q. How many in a cluster, about?

A. I guess there must have been about 16 or 18.

Q. What do you mean by the landing piers?

A. The landing pier, that is where the end of the draw lands on; you see, half supports the bridge and the other half supports the draw.

Q. That would be out in the stream, as you say, about 150 feet from the bank?

A. No; that would be from the center of the draw to where the draw connected with the main bridge; that would be your landing pier.

Q. About how far was that from the center?

A. Between, say, 80 and 100 feet, I imagine.

Q. It would go from the center of the draw out to wherever the bridge landed on the pier—that is where this square piling was?

A. Yes, they were driven in that pier, and also the draw pier.

Q. That is, the draw pier is the one in the center of the river?

(Testimony of William H. Dam.)

A. That is the one that holds the drawbridge.

Q. You say those were in clusters and square piles?

A. All in clusters except the drawbridge; the drawbridge was just a great big circular form. [168]

Q. That is out in the center of the stream?

A. That is where the center of the bridge rests on.

Q. Those that were driven in the piers on which the end of the drawbridge rested were driven in clusters? A. In clusters.

Q. About how many did you say in a cluster?

A. I should judge, 16 or 18 in a cluster.

Q. Was there any round piling driven in the same location?

A. Only for protection piles, so that the barges would h*alf* to strike on them before hitting that pier, going through.

Mr. FORD.—That is all.

Redirect Examination.

Mr. HALL.—Q. Were some of these square piling also driven in the pier east of the draw span and toward the Sacramento side?

A. What do you mean, protection piling?

A. No, in the pier itself, were there any of these square piling used in the first pier east of the draw-span?

Mr. FORD.—He has just testified they were all there.

A. Yes, all square piles.

(Testimony of William H. Dam.)

Mr. HALL.—Q. And then these protection piles?

A. I think there were four piers of square piling there. The Yolo side I don't remember about.

Q. But around this pier head, or pier east of the draw-span, there were some dolphins of round piling?

A. Yes, those were all round piles, those dolphins.

Q. Those dolphins were round piles driven in clusters, were they not? A. Yes.

Q. You also repaired this first pier east of the draw-span in 1892 by shortening that span, did you not?

A. Yes, we shortened it with piles, as I have testified before.

Q. Those were round piling that you used in shortening that span? A. Yes, all round piles.

Q. Now, in breaking off the piling of the '69 bridge, and breaking off the piling that was used in the false work of the 1878 bridge, did you go down and make an examination to see how [169] they had broken off, or anything of that sort?

A. All they do is feel around with a big pole.

Q. After they had broken them off? A. Yes.

Q. The piles might have broken off above the surface of the ground? A. They might; yes.

Q. From some defect in them, or axe cut, or something of that sort? A. Yes.

Q. Was the California Pacific running trains across the old 1869 bridge when you first knew it?

A. It was.

Q. That was in '68, was it, or '69?

(Testimony of William H. Dam.)

A. Well, I could not tell you about '68 or '69—I guess it was in the '70's, all right.

Q. It was in the '70's? A. Yes.

Q. Could you tell from what you saw of the old bridge when you first commenced to work on it about how long it had been erected?

A. I could not.

Q. Was it a new bridge?

A. No, it was old.

Q. It was very old?

A. Very old, dangerous, in fact.

Q. Could you tell whether or not it had ever been strengthened, apparently as though they were changing it over from simply a wagon bridge to a railroad bridge?

A. Well, I don't know; they might have; I would not know anything about that. They would have to put in more floor timbers, that is all.

Q. Have you seen the river recently down here?

A. What do you mean, the location of the bridge?

A. Yes, the location of the bridge. A. Yes.

Q. You know where the present drawbridge is, do you not? A. Yes.

Q. And the false work or protection work, the wing, that extends upstream from the present drawbridge? A. Yes.

Q. Was there not a pier in the old 1878 bridge that wase between the present drawbridge protection and the Sacramento shore?

A. We had a protection north of the old bridge, sure.

(Testimony of William H. Dam.)

Q. I know, but between the present protection and the Sacramento shore, there was one of the old 1878 piers, was there not? A. Sure. [170]

Q. With reference to that 1878 pier there between the present protection work and the Sacramento shore, was there any of the old 1869 piers right immediately about there?

Q. What do you mean, in the draw?

Q. In any place in the 1869 bridge were there any of the old 1869 piers driven on the same ground where this pier of the 1878 bridge was driven?

A. I told you that some of these piers I thought the other piles intersected.

Q. Say this particular one, the one toward the Sacramento shore, did it intersect with any of the piers of the old 1869 bridge?

A. I think we missed some of them; I think the length of the span was different, so we missed some of them.

Q. So it would not be there the same?

A. It would not be exactly the same, as far as I remember.

Q. From what you have seen of the river easterly, and what you knew of the piers of the old bridge, would you or would you not say that the pier between the drawbridge of the 1878 bridge and the Sacramento shore was about in the center of the present channel of the river?

Q. Do you mean the location of the old 1878 bridge, the draw?

Q. Of the pier.

(Testimony of William H. Dam.)

A. Of the pier, I think the pier of the old bridge was further toward Yolo.

Q. I know that the draw in the 1878 bridge was further toward the Yolo side, but now taking the pier that was between the drawbridge and the Sacramento side of the 1878 bridge, was it not about the center of where the present channel is?

A. On this Sacramento side?

Q. Yes.

A. I should judge it was. There were two spans there.

Recross-examination.

Mr. FORD.—Q. We will say here are the piling of the two bridges on the Yolo side. A. Yes.

Q. We will say here is the piling of the two bridges on the Sacramento side. A. Yes. [171]

Q. Those still appear in evidence?

A. They are in evidence, yes.

Q. The old bridge that was there when you first observed it, and which had been built before that, had something on which the drawbridge rested, didn't it? A. Yes.

Q. Somewhere out between those two bunches of piling? A. Yes.

Q. The same with the 1878 bridge? A. Yes.

Q. Now, have you any recollection as to whether or not the draw of the 1878 bridge was about midway between this piling on the two sides of where it rested?

A. I don't know; I couldn't say if it was midway; as near as I remember, there were two spans

(Testimony of William H. Dam.)

on each side of that draw.

Q. With reference to the 1869 bridge, have you any recollection as to where the piling on which the draw rested was, as to whether it was midway between the two sets of piling or where?

A. Practically the same, except that we had a draw-pier one side of the other.

Q. How much to one side of the other?

A. I could not tell you; the length of the draw span was increased somewhat.

Q. You mean the 1878 bridge had a longer draw-span than the other one? A. Yes.

Q. How much longer?

A. I don't know, I could not remember; it was long enough so that I think we intersected one pile and lapped by another; I forgot which way it went; we went by about half way of the draw-pier, as I remember it.

Q. You mean with the draws?

A. Yes; the draw-piers were not exactly in alignment.

Q. Were they opposite each other, somewhat?

A. I think about half, if I remember right.

Q. So that either one or the other they were like I have shown here? A. Yes.

Q. As I understand, then, there would be piling upon which the end of the drawbridge would rest?

A. The piers; yes. [172]

Q. In the 1878 bridge, something like I have shown here? A. Yes.

(Testimony of William H. Dam.)

Q. That is, the bridge out to that point is solidly floored? A. Yes.

Q. Now, then, with reference to the '69 bridge, they were not exactly opposite, as you remember it?

A. They were not opposite; if they were longer they would necessarily go beyond that.

Q. That is to say, the 1869 bridge was more like I have shown here? A. Yes, more like that.

Q. So that the piling of the 1869 bridge, that is, in the draw-pier, was further out in the stream from the Sacramento side than those in the 1879 bridge, as you understand it, or have you any distinct recollection upon the subject?

A. That much.

Q. How much?

A. That the draw span was longer than the old and somewhat out of line.

Q. Are you able to say, on the Sacramento side, as to whether or not the piers in the draw span of the 1869 bridge were opposite the piers in the draw span of the 1879 bridge, or whether it was nearer in shore or further out from the shore?

A. At this time, as I remember, they intersected one line of the old draw, and lapped by the pier on the other, because it was longer.

Q. Do you remember now whether the draw-pier, if that is the proper term, of the 1879 bridge, was nearer the Yolo side than the draw-pier of the 1869 bridge, or whether the opposite is the fact?

A. I think it was nearer the Sacramento side,

(Testimony of William H. Dam.)

that is, the draw-pier, I think, was, on the Sacramento side.

Q. Which draw-pier? A. Of the 1869 bridge.

Q. You think the draw-pier of the 1869 bridge was nearer the Sacramento side?

A. Yes— no, I mean the draw-pier of the 1869 bridge was nearer the Yolo side.

Q. You think the draw-pier of the 1869 bridge was nearer the Yolo side? A. Yes.

Q. Than the draw-pier of the 1878 bridge?

A. Yes. I think our new pier came east of the line, as far as I remember, this being Sacramento. [173]

Q. No, this is Sacramento over here.

A. Then you had it right first.

Q. This is Washington. You think I had it right in the first place? A. Yes.

Q. Here is upstream.

A. Yes, upstream; I think that is it.

Q. Which? A. I think we were on that side.

Q. Here is downstream. A. Yes.

Q. You went downstream this way, did you?

A. Yes—that is the way we were.

Q. This would be downstream. A. Yes.

Q. This is the 1878 bridge.

A. Up here; that is upstream.

Q. This we will call the 1869 bridge. A. Yes.

Mr. HALL.—You have got it wrong now.

A. Here is your new bridge. Here is up the river.

Mr. FORD.—Up the river, is it? A. Yes.

(Testimony of William H. Dam.)

Q. Then let us put it the way I had it; that is the way I had it; here is the new bridge, that is the 1878 bridge, and here is the 1869 bridge.

A. That is right.

Q. Here is the 1878 bridge, and this is the 1869 bridge, and here is upstream. A. Yes.

Q. Now, where do you want the draw-pier of the 1878 bridge, and where the pier of the 1869 bridge?

A. Put the 1878 bridge over here east of that.

Mr. HALL.—East of where it is now?

A. Yes.

Mr. FORD.—I will put it here with a circle, marking an X in it. A. Yes.

Q. Where do you want to put the draw-pier of the 1869 bridge? A. About where you have it.

Q. I will put a circle with two X's in it.

A. That is all right.

Q. A little toward the western side?

A. As I remember, yes.

Q. You say that from the draw-pier out to the west pier was a shorter distance on the 1869 bridge than on the 1878 bridge: Is that right?

A. Yes, that was a shorter distance. The new bridge was a longer draw than the old bridge; you can fix that [174] to suit yourself.

Q. Mr. Dam, did you ever observe the way the piling was driven in the old bridge that was there when that bridge was built, as to whether it was driven in clusters or how?

A. The original 1869 bridge.

Q. Well, whether it was the original 1869 bridge

(Testimony of William H. Dam.)

or the original 1858 bridge. A. No.

Q. The fact of the matter is it was not driven the same as they drove the piling in the 1878 bridge?

A. No, it was driven down, the piles were sawed off and what they call a grillage was put on it, a solid mass of timber, sunk under those piles, underneath the water; then they had timber framed together, and that was filled with rocks; that is what they call a crib.

Q. That is for the old bridge? A. Yes.

Q. Now, then, for the 1878 bridge.

A. They had pile piers.

Q. Did you ever observe, or do you remember now observing how the piling was driven for that old bridge, the one that was there when you came here, as to whether they were driven in clusters or in single piles, or how?

A. They were driven in mass, scattered all over, just so that they would catch this grillage; this grillage is a sort of mass of timber bolted together like a piece of flooring you cut out.

Q. You can see them now on the Yolo side?

A. You can't see that grillage now.

Q. Can you see the piles?

Q. You can see the piles that the grillage did set on.

Q. That the grillage did set on at that time?

A. Yes.

Q. And you say they are scattered all over?

A. Yes.

(Testimony of William H. Dam.)

Mr. HALL.—Q. The spans of the 1878 bridge outside of the draw span were longer, were they not, than the spans of the 1869 bridge, outside of this draw span?

A. Well, I won't say anything about that.

Q. Were there longer or shorter spans in the 1878 bridge than there were in the 1869 bridge?

A. Well, they might have had some spans longer. [175]

Q. But the center draw span was longer?

A. That draw span was longer.

Mr. FORD.—Q. How long would you say the draw span, if that is what you call it—

A. (Intg.) Yes.

Q. —in the 1878 bridge was?

A. I should think it would be about 200 feet,

Q. How long would you say that the draw span was in the old bridge that we will refer to as the 1869 bridge, over all?

A. About 160. I knew there was a great kick at that time about that being so narrow a bridge for the barges.

Q. That is, this old bridge? A. Yes.

Q. When did you first hear that kick?

A. Well, I heard it when I was knocking around here.

Q. You don't know anything about how long that bridge had been there?

A. No, I don't know, but you could hear the bridge-tender talking, and the men connected with the bridge talking.

Testimony of J. N. Coughlin, for Respondent.

J. N. COUGHLIN, called for the respondent, sworn.

Mr. FORD.—Q. Mr. Coughlin, where do you reside? A. Sacramento; 1323 Sixth Street.

Q. How long have you lived in Sacramento?

A. I have been here about 46 or 47 years.

Q. Since what year? A. 1874.

Q. When you were here in 1874 in what employment were you?

A. Steamer Department, belonging to the railroad company; I don't know what railroad owned them at that time.

Q. Do you remember anything about—you don't know which railroad owned it at that time?

A. I do not. I was a stranger here.

Q. Where were you located in your work?

A. At Front and K, between K and L.

Q. Were you acquainted with the situation so far as the bridges across the river were concerned at that time?

A. Well, I have seen them; I went out and looked at them. [176]

Q. How many bridges were there across the river in 1874, in that neighborhood?

A. One, a toll bridge.

Q. Of your own knowledge, do you know whose bridge it was?

A. No, I understood some railroad company had leased it from the county, or something of that kind, but so far as to say—

(Testimony of J. N. Coughlin.)

Q. (Intg.) You don't know of your own knowledge whose bridge it was?

A. No, not of my own knowledge.

Q. You saw railroad trains operated over it?

A. I did.

Q. Up to what time, if you remember, did that bridge remain there?

A. Till the latter part of 1877.

Q. What happened, then, so far as the bridges across the river were concerned?

A. I do not understand that.

Q. Was there a new bridge constructed?

A. There was a new bridge after that, after 1887.

Q. Where was that bridge constructed after 1887 with reference to the old bridge?

A. As far as I can remember, it was upstream.

Q. How near to the other bridge, if you remember?

A. It was not far; I could not say how far, but it was close up.

Q. You had nothing to do with the construction of either bridge?

A. No. I was only an observer.

Q. Only an observer?

A. Only an observer.

Q. Coming back to that bridge which was here when you went to work and over which you observed railroad trains operating, how were the rails laid on that bridge, if you remember?

A. The rails, I don't know much about, but I observed one thing, something I had not seen before,

(Testimony of J. N. Coughlin.)

the ties were put close together and the rails were laid on them. There was no space left between the ties.

Q. That is the point I was after. That is on this bridge that you observed there the ties were placed— A. (Intg.) Close together. [177]

Q. (Continuing.) And the rails across the ties?

A. Across the ties.

Q. That is, the railroad track was built much the same way as other railroad tracks, except that the railroad ties were placed close together?

A. To make a floor for wagons and everything else to pass upon.

Q. Now, do you remember whether or not the railroad trains continued to operate over that old bridge up to the time the new bridge was put into operation, or was there a period of time between?

A. There was a period of time there they did not operate because the bridge was condemned.

Q. The fact of the matter is, about a year after you came here that bridge was condemned, was it not? A. It might be a little later than a year.

Q. Anyway, for a period, we will say, prior to the time that this 1877 bridge was completed, the railroad trains did not operate over any bridge?

A. No; they had a boat there, a kind of ferry-boat, to take passengers back and forth.

Q. For how long a period would you say that was, if you remember now?

A. Well, I don't remember how long that had been; I couldn't say.

(Testimony of J. N. Coughlin.)

Q. Any way, there was a bridge built over the old bridge? A. Above the old bridge.

Q. And the trains started operating over that?

A. Yes.

Q. You knew that bridge up to the time it was removed in 1895 or 1896? A. Yes.

Mr. FORD.—That is all.

Cross-examination.

Mr. HALL.—Q. You spoke about the railroad using a bridge in 1874 that you understood was leased from some bridge company.

A. Well, I don't know whether it was leased from the county or from a company.

Q. Or from what?

A. Whether it was leased from Sacramento County and Yolo County, or from a company, I don't know which. I understood that they were paying rent for it. [178]

Q. You were employed in what capacity at that time A. Steamer landing.

Q. By one of the railroads? A. Well, yes,

Q. How did you get your pay?

A. From the pay car at that time.

Q. What railroads did you know at that time?

A. I knew both of them, the Cal. P. and the C. P.

Q. That Cal. P. is the California Pacific; let me not get you mixed.

A. The California Pacific crossed the bridge and went down to Vallejo.

Q. That was the California Pacific. And the C. P.?

(Testimony of J. N. Coughlin.)

A. The C. P. was the one that came over the mountain.

Q. Ran from Sacramento on to Ogden? A. Yes.

Q. And the California Pacific ran from Sacramento across the bridge and down toward Vallejo?

A. Toward Vallejo.

Q. And you were working for one of those companies? A. Yes.

Q. You got your money in a pay car?

A. In a pay car.

Q. At Sacramento? A. At Sacramento.

Q. You say the old bridge—we will call the 1869 bridge the old bridge. A. That is all right.

Q. Was condemned when they built the new bridge in 1878?

A. Before the '78 bridge was completed.

Q. And they ran the passengers across on ferries for a while?

A. The had a boat there running across.

Q. And that old bridge was torn down, then, about that time, was it not?

A. It was torn down just as quick as they could get it down and the other one up.

Q. As soon as the other one was up, the trains kept on running across the new one? A. Yes.

Q. Do you know who it was that condemned the old bridge? Was there any formal act?

A. I don't know who condemned it; whether it was the Government or not, I could not say.

Q. That was just general knowledge?

A. Just hearsay, or something probably I had seen

(Testimony of J. N. Coughlin.)

in the paper. Most of the news was in the papers anyhow.

Q. Was the new bridge, the 1878 bridge, built upstream pretty [179] close to the old 1869 bridge?

A. Well, yes, but I could not tell the distance.

Q. But there was some separation?

A. There was a distance between them, maybe a width of the bridge, or something of that kind.

Q. Was there something unusual about the way the ties were laid on the floor of the old bridge that attracted your attention?

A. Yes, it was something I never knew before; and a great many others passed the same remark.

Q. But it was simply a floor on the bridge made out of ties? A. It was a floor; yes.

Q. Was the old bridge ever strengthened or repaired while you knew it?

A. They had been working on there several times.

Q. They were working on it from time to time?

A. Yes, from time to time.

Q. You saw them put in new timbers?

A. I was not close up to see them do it, but I have seen the men at work on the bridge.

Q. Did you see them work with a pile-driver?

A. I have seen a pile-driver there, but I could not say what it was doing.

Q. The floor of the bridge was laid all level, was it not? A. All level; yes.

Q. So that the wagons could run right over the rails of the railroad?

(Testimony of J. N. Coughlin.)

A. The wagons could run over it the same as on the street.

Q. Were the rails set down in the ties?

A. The rails were set down level with the ties.

Q. Sunk into the ties? A. Sunk into the ties.

Q. There was a channel cut out in the ties?

A. A channel so that the wheels of the cars could go along and not interfere with the woodwork.

Mr. HALL.—With counsel's permission, I would like to take up a subject that has not been touched upon by this witness. [180]

Q. You were engaged in the boat business back there in 1874 and had to do with the boat landing?

A. At the boat landing; yes.

Q. How was the stage of the water there at that time?

A. Well, we had a very poor river, poor channel, but certain times of the year boats could not come up near Sacramento.

Q. During what years was that?

A. During 1874, 1875 and 1876, and later on; a certain season of the year they could not come within several miles of Sacramento; it was all piled up with sand, just at the time they were hydraulicking so much up in the mountains.

Q. Then did navigating conditions get better after that?

A. After the hydraulic business stopped and they commenced to build levees, and the channel commenced to wash out.

Q. Scour out, the boats could always come up?

(Testimony of J. N. Coughlin.)

A. Well, not always, but they managed to do better than they used to.

Q. The bottom of the river has been scoured there all along, has it not, since 1874?

A. Well, not since 1874; there was hydraulic mining later than that.

Q. Since they quit the hydraulic mining.

A. Since they commenced to build levees and confine the water in the river, the river commenced to work out; but before that, there would be only a little stream; there was more sandbars than you could see water.

Q. In the last five or six years you have had a pretty good channel?

A. Better than it had been for since I remember.

Q. More water for navigation along the front of Sacramento up as far as the present bridge?

A. Yes.

Redirect Examination.

Mr. FORD.—Q. By the way, on that matter, is there any difference between the operation of boats up to the neighborhood of the present bridge and above the present bridge?

A. Well, I never knew anything much above the present bridge; I was not interested in boats going up there. [181]

Q. I mean the channel of the river—is there any difference in the class of boats that run up to Sacramento below the present bridge, and those that run from Sacramento north up to Colusa, and those places?

(Testimony of J. N. Coughlin.)

A. I could not say anything about that. I do not understand that, above the bridge.

Q. That is, while you were working there in connection with the boats at the landing, you were not acquainted with the operation of boats?

A. No, not except what I would hear the captains or pilots say on the boats between here and San Francisco.

Q. You don't know anything about the draw of the boats between here and San Francisco and between here and Colusa, as to whether there is any difference in the depth to which the boats sink in the river?

A. Oh, yes, those boats between here and San Francisco, they would draw from five to seven feet, some of them, and up the river, there are boats running up the river drawing 22 inches; those boats were built for that purpose; of course, when they get older and they get water-logged, they probably would draw more water.

Q. They were built to draw 22 inches? A. Yes.

Q. Those are boats running from Sacramento up the river? A. Up north.

Q. But you say the boats running from Sacramento to San Francisco draw how much?

A. From 5 to 7—4½ to 7 feet, maybe, some of them.

Q. What about the barges that are drawn up the river from Sacramento, running up the river?

A. They are light draft, too.

Q. Do you know about what they were built to draw?

(Testimony of J. N. Coughlin.)

A. No, I don't know; according to the load which they would put on them; sometimes they would have 300 or 400 tons on them, maybe less, sometimes maybe more, but there were other boats that were to tow them that were built just for that purpose. [182]

Recross-examination.

Mr. HALL.—Q. These light-draft boats were built because they run up into the upper reaches of the river, toward Colusa?

A. Toward Colusa; they were just light-draft boats to run up the river toward Colusa and all of those places.

Q. The water grew shallower up toward Colusa?

A. Yes.

Q. So that they were not built of this light draft simply because they could not get up by the present drawbridge, there was plenty of water along the front?

A. Oh, no, there was water there; at certain times they used to have sandbars there.

Q. But generally, in navigating along the front of the city, here, clear up above the present Brown Warehouse, there was plenty of water along there, was there not?

A. I don't know much above the bridge at all.

Q. You don't know much about that? A. No.

Q. But the slightness of the draft of these particular boats was due to the fact that they went further up the river? A. Yes.

Q. Toward where Mr. Ford was born and raised?

A. Yes.

Testimony of Thomas F. Shartzer, for Respondents.

THOMAS F. SHARTZER, called for the respondent, sworn.

Mr. FORD.—Q. Mr. Shartzer, where do you reside? A. In Oakland.

Q. Street address?

A. 5768 Shafter Avenue, near College.

Q. What is your business or occupation?

A. Master mariner.

Q. Have you, in years past, operated boats on the Sacramento River? A. Yes.

Q. Covering what parts of the river?

A. San Francisco Bay and tributaries.

Q. How far up the river have you operated?

A. Butte City, on the Sacramento. [183]

Q. Are you acquainted with the river?

A. I should say I am. I have been there a long time.

Q. Are you a river boat captain?

A. Master and pilot; yes.

Q. Both master and pilot? A. Master and pilot.

Q. Now, what difference, if any, is there in the river channel—I say is there, and I refer to a time prior to July 13, 1918; we are not interested in the time since that—what difference was there in the river channel on July 13, 1918, and prior thereto, between Sacramento and San Francisco, and between Sacramento and going upstream?

A. Well, we always have fair water coming to Sacramento, but up the river it gets pretty shoal,

(Testimony of Thomas F. Shartzer.)

here from the bridge up, caused by the American River, of course.

Q. Caused by the American River?

A. Yes, the American and Feather; they have lots of debris coming down, and sand.

Q. How near does the American River empty into the Sacramento, with reference to the present bridge location?

A. I guess it is half a mile; I never measured it, but it is half a mile up there, about, I guess.

Q. Is there any difference in the character of the boats operated on the river between Sacramento and San Francisco, and the boats that are used from Sacramento upstream?

A. Oh, yes.

Q. What is the difference, just state it?

A. Well, we call them Bay boats, from Sacramento down, there are big, heavy boats, heavy-built boats, to stand bad weather in the bay, and let them get as far as Sacramento; take boats like the "Modoc," for instance; she draws, I suppose, 4½ feet; when heavily loaded she draws 7; that is, heavily loaded.

Q. You mean by "drawing 7," 7 feet of water?

A. Seven feet of water, yes. The "Navajo" will draw more water than the "Modoc" or "Apache"; she would draw 6 feet light. I was in her quite a long time and know.

Q. Up to what point do these boats operate?

A. Sacramento, foot of K Street. [184]

Q. Take the same with reference to the boats that run from Sacramento upstream.

(Testimony of Thomas F. Shartzer.)

A. They are a different character of boats; they are what you would call towboats, with the exception of the "Sacramento" and the "Valetta"—they are what they call light-draft boats.

Q. What do these boats that you are now mentioning draw?

A. The "Valetta," what we used to call trimmed up, 2½ or 3 feet—we call "trimmed" light; with oil put on her, on an even keel she will draw about, light, possibly less than 3 feet.

Q. What about the other boat you mentioned?

A. The towboats are built for light-draft towing, the "Bluff" and "Jacinto," and "Flora"—I believe the "Bluff" was built to draw 20 inches; whether she did or not, I don't know, but 22 or 24 inches, that is trimmed, as we call it; trimmed up to run you can handle them well; you put them down a little bit by the head, they tow these big grain barges—

Q. (Intg.) These grain barges, do you know anything about how much water they draw, the ones that run up north?

A. They draw very light, I suppose about a little over a foot to 3½ or 4; it is according to how they load them.

Q. They draw anywhere from a foot to 3½?

A. Yes, those are grain barges.

Q. Is there any other class of boats or barges that run up the river north of Sacramento which draw any greater amount of water than you have mentioned?

(Testimony of Thomas F. Shartzer.)

A. There are oil barges; they draw more water than the grain barges.

Q. Are they a particular class of barge?

A. They are just built for carrying oil; they take them down and pump them up with oil, and take them up here to the Great Western Power Company —the Great Western Power Company has a power-house above the bridge; and then there is one barge that goes up to Colusa.

Q. Do you know what they draw?

A. They draw more than the grain barges; I suppose they draw 4½ feet when they are [185] loaded, which they generally are; they are towed from Port Costa, but they set very deep in the water.

Q. With reference to a boat that might draw a great amount of water than the boats you have been mentioning, say if you were taking one of those boats up there that would draw in the neighborhood of 6 feet, what means would you have of determining whether you are going aground or going on a snag?

A. We always have sounding poles; we sound wherever we go.

Q. What would you do in sounding if you were going—

A. (Intg.) If you were going in water that you do not really know the depth of it, you would toot one whistle; that brings a sounding-pole on each side, a deck-hand comes on each side and sings out to you 3 or 3½, or 4, or no bottom, etc.; no bottom is about 6½ or 7 feet; the pole is marked at 6, and when they

(Testimony of Thomas F. Shartzer.)

lose the mark it is no bottom.

Q. Are you acquainted with the dredge boats that operate in the river?

A. I have passed them and towed them a great deal.

Q. You know, then, from towing them and observing them? A. Yes.

Q. Do you know anything about how much water they draw? We will take this boat particularly, the "Thor"; do you know anything about what it draws? A. No, I could not tell you.

Q. You never took any observations on that?

A. No.

Q. Assume that it draws between 5 and 6 feet of water, would there be any means by which the pilot, or captain, or whoever it is that is in charge of a boat of that kind, could determine whether he was going aground, or on a rock, or pile, or snag?

A. I do not suppose so.

Mr. HALL.—May I object to that, Mr. Ford, for the reason that you assume that she draws between 5 and 6 feet of water; she does not draw 5.

Mr. FORD.—The evidence shows she drew between 5 and 6.

Mr. HALL.—I think not; I think it is about 5.

Mr. FORD.—We have to determine that, because there is no use basing my examination on anything further. [186]

Mr. HALL.—That is correct.

Mr. FORD.—By the way, at about the time that this accident occurred on July 13, 1918, had you seen

(Testimony of Thomas F. Shartzer.)

the "Thor" up in these parts?

A. She was there in the bridge.

Q. You saw it there at the bridge? A. Yes.

Q. Getting back to the question I just asked you, assuming that the "Thor" would draw from 5 to 6 feet of water, and if she was being dropped down from, say, a mile above the bridge, down to a place below the bridge, how would the person in charge be able to determine whether or not he was going aground, or going on a snag, or bar, or any obstruction in the stream?

Mr. HALL.—May I ask just one question, Mr. Ford?

Mr. FORD.—Yes.

Mr. HALL.—Q. You have never navigated a clamshell dredger such as the "Thor," have you?

A. No, I just towed them, that is all.

Q. You don't know anything about their navigation?

A. No. I know they swing the bucket and drop the spud when they want to steer the dredge.

Q. You never have had any practical experience on a dredger?

A. No, I never worked on a dredger.

Mr. HALL.—May I interpose the objection at this time that the captain, not having had experience as a practical navigator of a dredge, is incompetent to testify as an expert as to how the "Thor" should have been navigated in the river at the time of the accident.

Mr. FORD.—My question does not go as to how

(Testimony of Thomas F. Shartzer.)

it should have been navigated, as to how it should have been steered, and so on, but what the man on the dredge could have done to determine whether a boat drawing 5 feet or 6 feet of water in that stream in the neighborhood of above this bridge—what they could do to determine whether they were going on any obstruction.

Mr. HALL.—Just for the benefit of the record, I object for the reason that is not a question which is determinative of the [187] rights of the parties. The question is whether or not she was being safely navigated as such vessels and craft were usually navigated at the time of the accident, not what they could have done.

Mr. FORD.—I am not much of an admiralty lawyer, but I assume that if she was not properly navigated that that is a question which the Court would consider in determining the amount of damages.

Mr. HALL.—That is quite true, if you show that they negligently navigated her, but the duty of navigating a craft properly does not impose the duty to do everything that they might have done. It is only to navigate her in the ordinary and usual way.

Mr. FORD.—Q. Take a boat that is drawing between 5 and 6 feet of water, and being operated from a mile above the bridge down to the bridge, will you state what would be the proper and usual way on July 13, 1918, when the water was at a level of approximately one foot above zero of the gage—what would be the proper way?

A. Well, the only way I could state it, the way

(Testimony of Thomas F. Shartzer.)

that we do when we go up there—I used to run up there every week—we sound every trip from the bridge up, that is, the Feather River, till we got to Boston Slough; of course, we were not posted where the water was, and that is why we sounded.

Q. In sounding just what would you do?

A. Just drop poles over and possibly sound every six feet, one pole coming here and one pole there, as the boat is proceeding slowly.

Q. What speed?

A. We slow down; if there is any current we do not go so fast but what a man can sound every six or ten feet.

Q. Suppose there was something wrong with the machinery above the bridge and you were drifting down, how would you do that?

A. If we were drifting down and something went wrong with the machinery, we would drop a hook out. We would never try to drop down that way with a steamboat. [188]

Q. What is the fact as to whether or not it would be proper navigation from a mile above the bridge to drift or drop any sort of a craft down there without your machinery operating?

Mr. HALL.—I must object to that unless it is confined to craft similar to the "Thor."

Mr. FORD.—I mean when drawing 5 or 6 feet.

Mr. HALL.—That is not similar or dissimilar. You will remember that the "Thor" was a boat without a propeller or rudder.

Mr. FORD.—It was not one without means of get-

(Testimony of Thomas F. Shartzer.)

ting a tow—is that what you call a boat to take it down?

A. Yes, a towboat. You mean what would have been the proper way to drop her down?

Q. Yes, if it was proper to drop her down at all.

A. I would not want to do it myself.

Q. Why?

A. I do not like the looks of that bridge ahead of me; it is a bad place there, and the current sets right in to the Pioneer Mill at that particular place; that is a bad place right there.

Q. What was the fact along about that time with reference to whether the water was unduly low?

A. I was not running up there at that particular time.

Q. I think it was 1.8 feet above zero.

A. The Sacramento?

Q. Yes.

A. Pretty low water. I had run there just a year previous, on the upper river of the Sacramento.

Q. In operating a boat past or through the bridge, the present bridge there in 1918, what was the proper place to operate the boats with reference to the protection pier that stands there, that is, during the low water in 1918?

A. We always, coming down, hold the boat as close to the S. P. bridge as we can; that keeps the barge from getting down near the Pioneer Mill; the current sets you in there, you see. When we have a tow, we hold over the bridge and the barge keeps as close as she can to us. [189]

(Testimony of Thomas F. Shartzer.)

Q. What has been your observation concerning others operating past there, as to where they operate their boats?

A. If they do not operate them there they get in trouble, that is all; that is, they are taking a chance of getting into trouble; but with all the barges there, we always hold right up to the bridge, that is, in the low water season; in high water you have got to go under full bell and hold up pretty close; we always say when we get through the bridge there, "Another lucky trip"; that is an old saying of ours, "Another lucky trip."

Q. I don't know whether you can answer this or not: In your opinion as a river pilot and master, would it, under any circumstances, be proper to allow any kind of a boat to drift down in that location?

Mr. HALL.—We must object to that, for the reason that this witness has not qualified himself as a navigator of dredges such as the "Thor," and for the further reason that it is common knowledge that there are different crafts, and different ways to navigate them, and different degrees of skill that are required in the navigation of different craft.

A. As I say, the only way I have handled them is to, when you get in a bad point, sing out to the dredger captain, "Drop out your starboard or port spud, or throw your bucket over."

Q. You have handled many of these dredges?

A. On a tow-line.

(Testimony of Thomas F. Shartzer.)

Q. Have you taken dredges past the Sacramento River bridge?

A. Yes; years ago that was; I used to be in a boat going to Stockton, and we did nothing but tow dredges one year—I forget what year it was, but the levees were breaking all over.

Q. In carrying these dredges, what means did the dredger captain have of controlling his dredge to keep it from drifting down; for instance, did you have your boat lashed on to the dredger, or did you tow it with a line?

A. Sometimes, in a bad place, we would make the boat fast to the dredger and drop her down, keeping together so as to get them where we wanted them, dropping around a bad point. [190]

Q. That is, you have taken dredgers both up and downstream? A. Yes.

Q. On many occasions? A. Yes.

Q. During your experience there on the river, have you ever seen dredgers drop downstream without a tow?

A. I never seen them drop down through there. They tow up the river and generally work down.

Q. But you never saw one drop through that particular locality?

A. No, I never did, to my knowledge.

Q. You say you saw this boat hung up to the bridge? A. Yes.

Q. When was it you saw it?

A. When she hung up, I don't remember the date, but I was in the "Fruito," and I was here in port

(Testimony of Thomas F. Shartzer.)

every day, and I could see her on the bridge there.

Q. Where was the "Fruito" running?

A. From Sacramento down to Highland, handling eastern fruit.

Q. Did you go through the bridge?

A. No, not through that bridge.

Q. You just saw the boat was there?

A. I could see her ahead of that north elevator, and I guess it is about 1,000 feet up there.

Q. You took no particular observation, then, as to how the boat lay there?

A. No; I just saw the boat laying up in the draw.

Cross-examination.

Mr. HALL.—Q. You never operated one of those dredgers, did you?

A. Not aboard of them; no, I have never been aboard of a dredger.

Q. When you would be taking a dredger up or downstream, would you ever ask the captain of the dredge to make soundings to ascertain the depth of the water? A. No.

Q. You always looked out for the water?

A. Yes, I always looked out for that.

Q. The river up as far as the Pioneer Mill here is a fairly good channel, isn't it?

A. Well, since 1913, November 9, 1913, I was master and pilot of the "Vallete," and we did have at that time trouble every year, right there at the bridge; there is a bar that forms there, not below the long false work, but right [191] in the draw.

Q. And in coming through there you would

(Testimony of Thomas F. Shartzer.)

swing toward the false work of the draw?

A. Yes, we used to drop through there with the steamer.

Q. That was the proper way to navigate that channel, to swing over toward the false work of the present drawbridge? A. Yes.

Q. And drop through in that way?

A. Fall right in alongside of the bridge.

Q. There is a whole lot of difference between navigating a craft with a propeller on the river and a craft like the "Thor," that has neither propeller nor rudder?

A. I never handled one of those; I could not tell you anything about it; I never had my feet aboard one to handle them; only by the tow line, that is all.

Q. You have seen this particular kind of craft going up and down the river all the time?

A. I have seen them working down; in shoal water they can work to wherever the work calls for them to go.

Q. In going down the river they are a cumbersome sort of craft? A. Yes.

Q. They have this great big boom of 100 feet that they drop behind? A. Yes.

Q. And take her down astern? A. Yes.

Q. And they can stop most anywhere they want to and feel their way along the river and take care of themselves, can't they?

A. If the current isn't too strong possibly they can, but on the upper river they often drop with a

(Testimony of Thomas F. Shartzer.)

line, put a line out and work with a line.

A. They sometimes drop the bucket and work down on the bucket, don't they?

A. Yes, in low water season they do.

Q. So that they are not handled at all like you would handle a craft under steam?

A. Oh, Lord, no; just have to drift, that is all. [192]

Q. They just drift down? A. Yes.

Q. You have frequently seen them just drift down the river here at Sacramento, have you now?

A. I can't say I have seen them drift around here, this bad place around Sacramento.

Q. You have seen them drift along the Sacramento River?

A. On the upper river, yes, and down below.

Q. And down below?

A. Yes, but never right around here.

Q. You have had a great deal of experience in towing these dredgers through the bridges here?

A. Not so much through this bridge; I have taken about three dredgers through this bridge.

Q. It is a pretty hard bridge to take a dredger through on at tow, isn't it?

A. No, she is all right; it has a good, big draw there, provided you have got water.

Q. You always had water to take them through on? A. Enough.

Q. In taking them through, have you taken them up or down through this draw? A. Both ways.

(Testimony of Thomas F. Shartzer.)

Q. You never struck on these piles in the river there? A. No.

Q. Did you know about them in the river?

A. No, I never knew there were any piles there.

Q. What means would you take to locate a group of hidden piles in the river?

A. You mean provided I knew they were there?

Q. Provided you didn't know they were there.

A. Well, I don't know; I would have to hit them first, I guess.

Q. You would have to hit them before you would find them, wouldn't you?

A. Yes, I would hit something, and of course then you would go and locate it.

Q. When you would hang up on them you would know you had got them?

A. I would know something was there.

Q. It would not be any careless navigation if a man did hang up on a pile that he could not see and did not know anything about, would it?

A. I don't know.

Q. Would it, or would it not?

A. I used to come down with the "Valletta" drawing six feet, and I never hit anything there. [193]

Q. You have with the "Valletta" drawing 6 feet, under a head of steam, and you never struck any of those piles? A. No.

Q. It would not be carelessness if you had struck them when you did not know anything about them?

(Testimony of Thomas F. Shartzer.)

A. I don't know whether we ever got over to them or not.

Q. But if you had struck them and you had not known they were there, that would not have been carelessness on your part, would it?

Mr. FORD.—I wanted to ask that question myself, whether the thing would have been carelessness or not, and I notice the Judge down there the other day allowed that question, but I have always understood that you cannot ask a witness whether it is carelessness. That is a conclusion the Court is going to draw.

Mr. HALL.—Q. Would that be poor navigation?

A. I don't know how you would answer that. Of course, if we hit a snag up the river—if a pile was there and there was not any current at all, it always leaves a wake, and you can always pick them up; that is the way we do up the river.

Q. You do not find them at midnight that way without any light, when you come down?

A. We do not often come down with a load at night-time; we used to tie up at Bannon Slough at night and come down in the daylight.

Q. In towing a dredger up the river, which end would you fasten your tow to of the dredge?

A. We always call it the bow, we tow from the bow; that is, her boom is aft.

Q. No, but designating the boom and the dredge as the bow— A. That is always the stern.

Q. But designating that as the bow?

A. We would tow her by the stern.

(Testimony of Thomas F. Shartzer.)

Q. You would tow her by the stern?

A. Yes; they usually have a rake on the stern, some do; the late dredgers have a rake.

Q. If you were dropping downstream, you would drop her down bow out, would you not, or bow behind?

A. The way that we [194] would drop them down, if there is any current, we would get hold of her with the bow of the boat, just like we would with a towline, get the bow of the boat, to say the stern of the dredge, and work her around, so that we could drop her down, but the bucket is always going down first. I have dropped them down that way around the San Joaquin River for Hollenbeck, whenever we had a tight hole to drop them in and move them any distance at all, because we could not get under that bucket.

Q. Therefore, you have the bucket downstream when going up? A. Yes.

Q. And upstream when you are going down?

A. Not always; as I say, when you are towing them down on a towline, the bucket is behind, but if you get in a bad hole you turn the dredge around and make the bow of your boat fast here with a line on the side, and you can pull her with your capstan whichever way you want to; if you get into a tight hole, coming down with the current, when you drop the spud, off she goes.

Q. That snaps your towline in two, does it not?

A. Sometimes.

(Testimony of Thomas F. Shartzer.)

Q. And brings you up and swings you into the bank?

A. Yes, but coming down we always keep the bucket down below, and the dredger captain can out his bucket whichever way he wants to.

Q. And guide his dredge with that? A. Yes.

Q. And swing it from side to side? A. Yes.

Q. I don't know whether I have got you clear or not, but this question I want to ask you: You have been trying to explain it and I have not understood it: In towing down the stream you have the bucket and the boom of the dredge the furthest to the rear? A. Astern.

Q. In other words it is astern? A. Yes.

Q. And in going up you have the boom and the bucket of the dredge astern? A. Yes.

Q. By the way, do you know Captain Hollenbeck?

A. I knew of him when he built the first "Hollenbeck," the dredge [195] "Hollenbeck."

Q. Captain Hollenbeck has been a builder and navigator of these dredges up and down the river here for a great many years, has he?

A. The first I knew of them was when we towed him from Steamboat Slough, on the upper San Joaquin River; that is how I happened to know the dredger; whether Captain Hollenbeck was aboard or not I do not know, but the dredger's name was "Hollenbeck."

Q. But you have known of Captain Hollenbeck himself, haven't you? A. No.

(Testimony of Thomas F. Shartzer.)

Q. You don't know him personally?

A. No; if I remember rightly, I had him pointed out to me; he is a tall man with a dark moustache.

Q. Yes, kind of a heavy man, with a heavy moustache?

A. I would know him if I saw him; whether he was on this dredge when we were towing it, or whether he was up there in a launch when we got there, I don't know.

Q. Have you heard anything about his reputation as a dredge master? A. No.

Q. You captains of steamboats do not have much to do with dredgers, except at the ends of towlines, do you?

A. Of course, if we meet each other we are always friendly; I have a Captain Brown I am quite good friends with, who was captain of the "Argyle."

Q. Is there a tide here in the Sacramento River?

A. Yes.

Q. How much of a tide is there?

A. Since they opened that gate at Rio Vista, we get, I would say, from a foot to two and a half feet.

Q. When did they open that gate at Rio Vista?

A. I could not tell you.

Q. About how many years ago?

A. I could not tell you; they have been working on it so long, I don't know when they would say they had it open.

Q. Was it open or effective in the river here prior to July 1, 1918? A. Oh, I guess it was. [196]

(Testimony of Thomas F. Shartzer.)

Q. Would that tide have any effect on the current above the bridge?

A. Yes, it might slacken it up.

Q. Slow it down a little bit, wouldn't it?

A. Back water, we would call it; you do not get any tide here—back water.

Q. Does the fact that the tide has come into the channel here in front of Sacramento in the last few years indicate that there is a lower river-bed, that the bottom of the river-bed is lowered?

A. I could not say as to that.

Q. You could not say as to that. A. No.

Mr. HALL.—That is all.

Redirect Examination.

Mr. FORD.—Q. Captain, one other matter I want to ask you: In towing a dredger through the draw of the bridge there, or in bringing a barge through there or taking a boat through, would you ever on any occasion, during low water, operate out say a hundred feet from that protection wall?

A. We rarely get that far away.

Q. Where is the deep water there—is it out toward the protection draw, or over toward the Sacramento shore?

A. Well, all the boats that make a little water, going up there, we always follow, we try to follow alongside of the bridge, and then when we get up through the bridge we get over to the middle and go right up; every boat working there stirs it up a little bit, and we know, coming down here, if we come in here the barge sets in to the middle; if we keep

(Testimony of Thomas F. Shartzer.)

in here we can hold her up, because he has rudders on his barge, and consequently he draws over to us and draws through, and we are in better shape to let go of the towline and pick up.

Q. With a dredger drifting down or dropping down there, would there be any occasion for it to operate over near the Sacramento shore, rather than out in the middle of the deep water?

A. If a person did not understand the set of the current, he would naturally drop in there, because he would not think about keeping up to the bridge. [197]

Q. The current throws you over there?

A. The current always naturally throws you right in there.

Q. In navigating a boat down the river, are you required to have a pilot on board?

A. Yes, a master and a pilot; the master has a license called master's and pilot's license.

Q. Before you are allowed to operate on the river you have to have that?

A. You have to have a pilot's license to act as a pilot.

Recross-examination.

Mr. HALL.—That is on a steam-propelled craft?

A. I am speaking of steamer licenses.

Q. You are not speaking of a clamshell dredger?

A. I don't know anything about them.

Q. You don't know whether they have to have that or not? A. No.

(Testimony of Thomas F. Shartzer.)

Redirect Examination.

Mr. FORD.—Q. You don't know whether a barge has to have them or not?

A. No. They have what they call barge pilots, but they are not required to have a license; they are at the end of the towline, and the boat is responsible for the tow.

Q. In towing a barge, do you have a pilot barge?

A. We have what they call a pilot barge there, a boat steerer; but of course if the towline is drawing they are helpless; they couldn't do anything, they couldn't back, or fill, or anything.

Q. What if a barge should drift down the river alone?

A. They take an awful chance of wrecking themselves.

Q. You have never seen one drift down that way?

A. They get away sometimes and cause a lot of damage; a boat always has got hold of them.

Q. In bringing a barge down, do you tow it down or follow it down?

A. Tow it down as a rule; sometimes we drop down; if the water is bad up there we drop her down, get alongside of her and get a line on her stern and just drift along, so we can hold her up.

Q. The same as you have described with the dredger?

A. You hold her up the way you want her. The channel changes there [198] so much you find it on one side one year, and a dredger comes up and cuts it out another year.

(Testimony of Thomas F. Shartzer.)

Q. Do you know anything about the channel there in the neighborhood of the present drawbridge, as to whether there has been any change in that channel during the last several years?

A. Oh, it changes ever.

Q. In what way?

A. The current from the Feather—if the Sacramento River is at a certain stage and a big freshet comes down the American River, it is apt to turn that water onto the Yolo side, and it will come down to Rocky Point hit a jetty there and go over to the bridge.

Q. What jetty?

A. There are several jetties above and below Rocky Point.

Q. Where is Rocky Point?

A. A short distance above the bridge on the Yolo side.

Q. There is a jetty there that throws the current?

A. There are several jetties there, and they will throw it over.

Q. Has that had anything to do with changing the channel in the neighborhood of the bridge?

A. Oh, yes.

Q. Or do you know whether it has or not?

A. Some years they have to get a dredger up there to dredge in there, to let the boats go straight up; it is so mean to make them go around there with a barge; they always want a straight channel, they always cut a channel up to the Feather River.

Q. Do you know whether or not the channel on

(Testimony of Thomas F. Shartzer.)

the Sacramento side of the river in the neighborhood of that drawbridge has been cut out in recent years, or filled up, or what the fact is?

A. Well, I could not tell you. I knew up to the time I left the "Valetta," which was about May 1st, I guess, we used to have bad water there all the time.

Mr. HALL.—Q. May 1st of what year?

A. 1917.

Mr. FORD.—Q. You used to have bad water where all the time?

A. Right from the bridge up to the American River.

Q. In what way did you have bad water from the bridge up? A. Shoal water. [199]

Q. It would fill up with sand?

A. That is in low-water season, fill up with sand.

Q. Of course, during the deep water there was no trouble anywhere? A. No.

Recross-examination.

Mr. HALL.—Q. You were talking about navigating and towing barges a while ago; they have not any bucket or boom on the rear end of them?

A. No, but they have four rudders on the stern.

Q. They don't even carry an anchor, do they?

A. Yes, a good one, too.

Q. But they have nothing to swing from side to side to aid them like a clam-shell dredger has?

A. No.

Q. So that the navigation of a clam-shell dredger and a barge are entirely different things?

A. Yes.

(Testimony of Thomas F. Shartzer.)

Q. And there is no comparison between the way you would navigate one and the way you would navigate the other?

A. Only in dropping, you drop the barge the same as you drop a dredge.

Q. But you would not have the protection in dropping a barge of the boom and the bucket that you would have on the dredger, would you?

A. You would use the rudders; the rudders are downstream, and your rudders are upstream, and you can move them anyway you want to.

Q. But in tilting or lifting her from side to side, you would not have the benefit you might be able to get out of swinging the boom or bucket?

A. With a barge, we always have her on an even keel.

Q. But in a dredger you can list her from side to side with this boom, can't you?

A. I suppose you can.

Q. You never have had the experience?

A. I never handled one of them.

Q. Do you know the "San Joaquin"?

A. The steamer "San Joaquin"?

Q. Yes. A. I know her.

Q. How much does she draw?

A. There are two of them; there is [200] one No. 2 and one No. 4.

Q. The No. 2, what does she draw?

A. I think she draws 3 feet.

Q. What does the No. 4 draw?

A. She will draw more than that, 4 or 4½.

(Testimony of Thomas F. Shartzer.)

Q. You have taken her above the bridge?

A. No.

Q. You have seen her go above the bridge, haven't you?

A. Well, she goes above the bridge; she takes a barge up to the mill once in a while for lumber or something.

Q. You have gone through there with a barge, have you? A. Yes.

Q. Lashed to the side?

A. No, on a towline, generally, on the way up.

Q. On the way up, but I mean coming down.

A. Yes, we have dropped down.

Q. You have dropped down with a tow?

A. Yes.

Q. On a line, or lashed to the side?

A. No, bow to bow.

Q. How far out would you navigate the tow from the crib work or protection work on the draw there in coming downstream?

A. Well, as I said, pretty close to the draw.

Q. You would be pretty close to the draw?

A. Yes.

Q. Those barges are about 60 feet wide, aren't they?

A. Oh, no; about 40; 36 or 40; I really never measured them, but they are not over 40.

Q. The "Thor," I think, is 36 feet wide. About how far would she stand out in the stream from the protection work at the present draw in going downstream, through the present draw?

(Testimony of Thomas F. Shartzer.)

A. As I say, I don't know; it is quite a distance from the draw over to the shore side of the bridge; I don't know the distance.

Q. I know, but you can tell me about how far out you would stand in the stream from the protection work in the present draw in going down?

A. As close as we could get, maybe off 5 or 10 feet, that is, off of the long draw. We drop in here. That is hard to say. You are putting it a little too close there. [201]

Q. However, you might be a little more or less closer?

A. Well, yes, we always keep in close; we do not want to get on to the approach; I call the approach coming from shore.

Q. There was not much current in that river, was there, at the bridge during 1918, when the tide was there? A. I could not tell you.

Q. You don't know anything about that?

A. I don't know. I was working on the river every day, but I never paid much attention to it; I could not safely say.

Q. You were not navigating above the bridge during that time?

A. No, not at that time, just at Sacramento.

Q. So you were not at all familiar and cannot tell us what the currents were, and what the tides were, and what the conditions were?

A. No.

Testimony of J. C. Boyd, for Libelant (Recalled).

J. C. BOYD, recalled for further cross-examination.

Mr. FORD.—Q. With reference to these notes that were put in evidence upon the first day of the trial in this case, are you able, from an examination of those notes, to tie them into any particular object, so as to locate the piles and the other matters that are shown on the map, or does it require any further data?

A. Only if taken in connection with the exhibit marked "Libelant's Exhibit 10" and with an additional survey to determine the position of the corner which is shown there.

Q. That is, which corner do you refer to?

A. On the wharf, of the Ennis Brown wharf.

Q. That is, assuming that the Ennis Brown wharf is correctly shown in Exihibit 10 and the protection pier of the existing bridge is properly shown in Exhibit 10, then you are able, with the notes, to locate the piles?

A. I think I would be able to locate these piles with that.

Q. You have got to assume, though, the correctness of the Exhibit 10, as to both the protection pier of the bridge the [202] corner of the Ennis Brown wharf—and I will mark the corner of the Ennis Brown wharf with an "X."

A. In addition to that a scale would have to be used in order to get the relative positions of the end of the bridge the end of the pier, the length of

(Testimony of J. C. Boyd.)

the protection pier, and on the assumption that this plat correctly represents the actual conditions on the ground.

Q. As I understand you, you have not, yourself, figured those matters? A. I have not.

Q. You don't know of your own knowledge at the present time whether these are correct or are not correct? A. No, I do not.

Testimony of Charles R. Hall, for Libelant (Recalled).

CHARLES R. HALL, recalled for further cross-examination.

Mr. FORD.—Q. Mr. Hall, with reference to the matter I have just been questioning Mr. Boyd, are you able to determine from the notes that were put in evidence on the first day of the trial—

Mr. HALL.—Do you mean the notes produced from Colonel Rand's office?

Mr. FORD.—Q. Yes, to locate from those notes the piles that were shown on Exhibit 10 and the objects shown there, such as the Ennis Brown wharf and the protection pier of the bridge?

A. Well, I have to assume the correctness of this plat.

Q. You have not figured these matters yourself, have you? A. No.

Q. So, of your own knowledge, you don't know whether they are correctly located or not?

A. No, not of my own knowledge.

(Testimony of Charles R. Hall.)

Redirect Examination.

Mr. HALL.—Q. Mr. Hall, this Exhibit 10, on which these piles are located as a result of the survey of the Government [203] Engineer, Mr. Harden, was made at the time or immediately after the survey was made by Mr. Harden, was it not?

A. Oh, yes.

Q. And this plat was compiled as a result of that survey? A. Yes.

Q. And the plat, and when I say "plat" I include both the location of the present bridge, the wing dam, the protection dam of the present drawbridge, and the corner of the Brown or Pioneer warehouse or mill?

A. Yes, that was right at that time.

Q. So that evidently this entire plat was made as the result of the survey by Mr. Harden, and the protection wing of the present drawbridge, the piles in the river, and the corner of the Pioneer mill were put on there as a result of that survey, and are relative to each other by actual survey as shown upon that plat? A. That is true.

Q. It is also a fact, is it not, that at the time the survey was made the notes of the back site to the station on the Yolo side and the location of that point on the Yolo side, to which the back site was made, were in the possession of the draftsmen who drew up this plat?

A. Yes, it was. Another feature about that is that if there is any deviation here this whole thing turns, not merely the piles, but this, too.

(Testimony of Charles R. Hall.)

Q. The river and the warehouse and the bridge?

A. In other words, this, in itself, is complete; that is, the protection work, the bridge, the piles, and this corner of the wharf will all rotate around this line here to the back site.

Q. So that if you rotate the piles, you rotate the bridge and the river, and the warehouse, and everything else?

A. You rotate the whole thing? [204]

Testimony of H. A. Lathrop, for Respondent.

H. A. LATHROP, called for the respondent, sworn.

Mr. FORD.—Q. Mr. Lathrop, I show you Libelant's Exhibit 10, and ask you whether or not you have made any calculations and maps based upon the data contained upon that exhibit with reference to the length of the piles shown there?

A. I have based in part on that exhibit.

Q. Based in part on that exhibit? A. Yes.

Q. Have you used the same numbers on your drawings that are given here?

A. Yes, the same pile numbers.

Q. The same pile numbers?

A. Yes. These numbers refer to Mr. Harden's survey.

Q. Have you, also, in making your diagram, taken into consideration subdivision 2 of the permit issued by the Secretary of War for the building of the 1895 bridge? A. I have.

Q. With reference to lowest or low water?

(Testimony of H. A. Lathrop.)

A. Yes.

Q. I show you a diagram marked "Section of river channel showing top of piles with reference to Government's required cut-off," and ask you to explain what that is.

A. On this section I have shown first at the top the level which was considered as low water referred to in the Government permit dated June 11, 1895, this being specified as Elevation 7.5, referring to the K Street gage. I have also shown the elevation 0.5, which is 7 feet below this low-water line, and which is the line to which this permit spefied the piles should be cut off.

Mr. HALL.—Let me interpose an objection to this. Libelant objects to this for the reason that the requirements of paragraph 2 of the permit, while they were a prerequisite to the right of the California Pacific Railroad Company to construct the new or 1895 bridge, they were not such as would relieve the defendant from the duty of entirely freeing the river from obstructions to navigation, and in no wise relieve the respondents from their duty to third parties to entirely remove from the channel of the river anything which might h ave [205] been or might have become an obstruction to navigation. May my objection go to all these questions upon that subject, Mr. Ford?

Mr. FORD.—Yes.

A. Then I have also shown a section of the river channel with reference to the level datum of the K Street gage, that is, zero on this is zero on the K

(Testimony of H. A. Lathrop.)

Street gage. I have shown in the diagram the piles designated on the Exhibit 10 showing them diagrammatically, designating the cut-off of each pile with reference to this zero line of the K Street gage.

Q. Have you numbered the section of the pile shown on your diagram the same as the numbers on Exhibit 10?

A. Yes. I have shown in detail the distance from the top of each pile as cut off to zero datum of the K Streetgage. I have also shown on this section the water level as of July 12, 1918, as obtained from the records of the United States Weather Bureau in Sacramento.

Q. Do you know what time of day those water levels were taken?

A. Approximately seven o'clock.

Q. Seven o'clock P. M.? A. A. M.

Q. Now, referring to the matters you have mentioned that you have shown on your diagram, and assuming that the Exhibit 10 is correct, with reference to the length of the piling shown there, does your diagram correctly show the distances from zero to the top of the piling as it existed when this Exhibit 10 was made?

A. Yes; it shows in another form the same information which is shown on Exhibit 10.

Q. What is your business?

A. Assstant engineer of the Southern Pacific, technicaly United States Railroad Administration.

Q. How long have you been such?

(Testimony of H. A. Lathrop.)

A. I have been employed in this particular office for nine years.

Q. How long have you been an engineer?

A. Thirteen years.

Q. Are you a practical engineer, or a graduate engineer? A. Graduate. [206]

Q. Of what school? A. Iowa State College.

Q. You have also had how much experience in that line?

A. I have had more than 13 years, probably altogether 14 or 15 years.

Mr. FORD.—I will offer this in evidence and ask to have it marked Respondents' Exhibit "B."

Mr. HALL.—You offer that only as illustrative of the testimony of the witness?

Mr. FORD.—A little more than illustrative—I have not taken each one of these matters and asked him the question about it. Assuming that the evidence is admissible, the diagram, itself, will really answer the questions; I assume there is no use in asking the witness each question separately.

Mr. HALL.—For that purpose, I have no objection. I make the general objection that I made that this showing as to whether the piles were cut off does not relieve in any way the Southern Pacific and the California Pacific from their duty to this libelant, even though the permit was granted.

Cross-examination.

Mr. HALL.—Q. Now, Mr. Lathrop, in making this plat which we have marked Respondents' Exhibit "B," you took as correct the notes presented

(Testimony of H. A. Lathrop.)

by the libelant from the California Debris Commission office, of which Colonel Rand is the head, did you not?

A. You mean what is spoken of as the Harden notes?

Q. I mean the notes and the figures on Libelant's Exhibit 10. A. Yes.

Q. You took and assumed them to be true?

A. Yes.

Q. And it was upon such an assumption that you figured out this graphic here? A. Yes.

Q. You assumed that the soundings were true?

A. Yes.

Q. Wouldn't you equally assume that the rest of Exhibit 10 is true?

A. I would assume that—just a minute—you are referring to what portion of Exhibit 10?

Q. All of it there.

A. I would say Exhibit 10 as it refers to this reference point here is correct. [207]

Q. That is, it refers to the reference point on the end of the protection work of the present drawbridge?

A. Yes. That is, it may be oriented around somewhat.

Q. But if you orient one point you orient all, don't you?

A. All of the things which are shown in the Harden notes.

Q. Wouldn't you assume that a man, in making that plat, if he had before him the location of the

(Testimony of H. A. Lathrop.)

bridge and the Pioneer Mill and the protection work of the drawbridge that he would make that conform to his location of the piles as he was depicting them on the plat he was drawing?

A. Yes, if he had the correct information.

Q. Assuming that he did have the correct location of the bridge and the Pioneer Mill, the protection work, and the present draw, you would say, then, you would assume that the entire plat was correct, would you not? A. As far as I know, yes.

Q. It was upon a similar assumption that you have made up your graphic here, Respondents' Exhibit "B"? A. Yes.

Q. You knew, did you not, from the notes from Colonel Rand's office from Exhibit "B," which was also from Colonel Rand's office, and from the testimoney of Mr. Charles Hall, that the notes of the soundings which Mr. Harden made yere made after the "Thor" had been removed from the piles?

A. Yes.

Q. You also know from the record in this case, do you not, that the divers Porter and Fuse cut off a portion of the piles which were in the river when the "Thor" went down?

A. I understand it is a matter of record that some was cut off.

Q. And that in some cases there was anywhere from two, to five, or six feet of those piles cut off?

A. I understand from two to four.

Q. From two to four? A. Yes.

Q. So that, then your graphic here, as you have

(Testimony of H. A. Lathrop.)

depicted the top of the piles, does not show the true height of the piles, or true distance between the tops of the piles and the level of the river on July 13, 1918, at the time the "Thor" sank on [208] those piles? A. No, it shows the height after.

Q. So that you would have to add to those piles on your plat, Respondents' Exhibit "B," that the "Thor" sank on as many feet as were sawed off by the divers in order to get the exact level of the top of the piling as they were left in the bed of the river at the time the bridge was destroyed?

A. Yes.

Redirect Examination.

Mr. FORD.—Q. By adding that data, that is, the amount of piling that was sawed off to the data, you have placed on your diagram Exhibit "B," the information will be before us that that diagram has not on it?

A. Yes, the information for it can be obtained from the testimony of the amount cut off.

Q. That is, assuming someone is able to say how much was cut off, all we have to do is to add it to your numbers here? A. Yes.

Recross-examination.

Mr. HALL.—Q. But you don't know which particular pile any quantity was cut off of, do you?

A. Not of my own personal knowledge, no.

Q. You don't know whether it was cut off of No. 8, or cluster 16, or cluster 3 or 4, or 13, or whatever it might be?

A. Not of my personal knowledge.

(Testimony of H. A. Lathrop.)

Q. This cluster of piles that you have depicted on your graphic is taken across the river and not up and down stream?

A. Yes, that is what would be known as an elevation view; that is, while it is a section across the river here, everything beyond would be shown in the elevation on the same section.

Q. Your company made no soundings there, itself, that you know of, of those piles?

A. No, not of those piles.

Q. Have you any record in your engineering office to show whether or not, after the destruction of the 1878 bridge in January and February, 1896, the engineers of your company, or anyone acting on behalf of either the Southern Pacific Company or the California Pacific Railroad Company, made any soundings [209] or measurement, or soundings and measurements to ascertain to what depth the piles had been blown off or removed?

A. I have not seen any such records.

Q. Have you made a search of your company's files to ascertain whether there are in existence any such records? A. I have not made a search, no.

Q. Do you know whether or not a search has been made of your files for that purpose?

A. I can only speak on belief; I believe a search has been made, but I cannot say positively that it has.

Q. None has been called to your attention, however? A. No.

Q. Will you please tell me whether this cross-

(Testimony of H. A. Lathrop.)

section of your graphic is looking upstream or downstream? A. It is looking upstream.

Q. It is looking upstream, and then the left-hand side of the graphic would be the Yolo side, and the right-hand side would be the Sacramento side?

A. Yes. It was prepared in a hurry, and we overlooked that.

Q. You have indicated the water level on July 12, 1918, as 1.8 feet, with reference to the level on the K Street gage? A. Yes.

Q. Now, can you tell me what was the state of the water on the K Street gage on the night of July 13, 1918, at midnight?

A. No. I have not searched far enough to get that.

Q. Can you get that data for me?

Mr. FORD.—It is already in evidence, is it not?

Mr. HALL.—No, not at that hour.

A. I do not know any way to obtain any readings at midnight.

Testimony of J. C. Boyd, for Libelant (Recalled).

J. C. BOYD, recalled.

Mr. HALL.—Q. Have you in your possession a hydrograph of the stage of the water at Sacramento on the night of July 13, 1918? A. I have.

Q. What was the stage of the water at Sacramento at that hour [210] on the 13th?

A. Elevation 3.2 or 3.3; the line is a little indefinite; it is between 3.2 and 3.3.

Q. Was that on a rising or a falling tide?

A. That was on the high water.

(Testimony of J. C. Boyd.)

Q. High water? A. High tide.

Q. At high tide? A. Yes.

Q. So that it had been rising all the way from ten o'clock on? A. Yes.

Q. If we are mistaken about the date, what was it at midnight on the night of the 12th?

A. 3.2 feet.

Cross-examination.

Mr. FORD.—Q. Now, then, Mr. Boyd, what time of the night was the tide at 3.2 or 3.3 on the 13th?

A. At midnight of the 12th, exactly at midnight; it remained about one level from about half-past eleven to half-past twelve, and on the 13th it remained on the same level for nearly an hour, I should say, by this hydrograph.

Q. At what time on the 12th and the 13th did the tide start to rise? Take first on the 12th, what time did it start to rise?

A. It was at its lowest low water at eight o'clock in the evening of the 12th, at which time it was elevation 1.3 or 1.4, probably 1.4; then it started to rise from that time on until midnight, or nearly midnight.

Q. The same on the 13th?

A. On the 13th I would say that the lowest water was about at half-past seven, at which time it was at elevation 1.4, and it rose from that time until about midnight of the 13th, at which time it reached an elevation of, as I said before, of about 3.2 or 3.3.

Mr. HALL.—Q. Can you tell me the stage of the

(Testimony of H. A. Lathrop.)

water at 10:30 P. M. on the 12th and also on the 13th?

A. At 10.30 of the evening of the 12th the elevation of the river was 2.7 and on the evening of the 13th, at 10:30 P. M., it was 3 feet.

(By consent, an adjournment was taken until Monday, December 15, 1919, at 11 o'clock A. M., at San Francisco.) [211]

Monday, December 15, 1919.

Testimony of H. A. Lathrop, for Respondents (Recalled).

H. A. LATHROP, direct examination (resumed).

Mr. FORD.—Q. Mr. Lathrop, since the last session have you located the data from which Mr. Harden made his survey?

A. Yes; that is, I obtained from him the location of the back site which tied in his survey.

Q. With that, have you made any diagram or map of the location of the 1858 bridge and 1878 bridge at Sacramento? A. Yes.

Q. Have you that diagram and map with you?

A. Yes.

Q. Just exhibit it, will you please? A. Yes.

Q. You sketched this on here from this data that was given on one of the exhibits, that is, the distances?

A. That is located from the exhibit which has the title, "Vicinity Map of Sacramento River at S. P. Bridge," 2A.

Q. That is, you placed the "Thor" in pencil

(Testimony of H. A. Lathrop.)

drawing from Exhibit 2A? A. Yes.

Q. Have you on this diagram presented here located the center line of the 1858 bridge and the 1878 bridge? A. Yes.

Q. Have you on this diagram also located the piling shown on Exhibit 10? A. Yes.

Q. You have shown also the present drawbridge, with the protection work. A. Yes.

Q. The Pioneer Mill, and the other data shown on the diagram? A. Yes.

Q. From what data did you locate the center line of the 1878 bridge and the 1858 bridge—what data on the ground there?

A. That center line is located from the existing remains of a pier on the Yolo side, and from the piles under the wharf near the Pioneer Mill.

Q. On the Sacramento side? A. Yes.

Q. That is with reference to the 1878 bridge?

A. That is with reference to the 1878 bridge. The Yolo bridge, what we call the Yolo or 1858 bridge was located in a similar manner, the center line, from existing piles. [212]

Q. Are these existing piles on both the Yolo and the Sacramento side in evidence? A. Yes.

Q. At the present time?

A. They were when the survey was made.

Q. When was the survey made, about?

A. The survey for those was made—I have not my notes; I am rather indefinite as to when we made it, but about a year or two ago. However,

(Testimony of H. A. Lathrop.)

those on the Sacramento side have been checked recently.

Q. That is, the piling in the 1878 bridge on the Sacramento side have been checked recently?

A. That is the 1878 bridge.

Q. In extending the data from Exhibit 10 on this map you have made, you have located the piling shown in Exhibit 10, have you, with reference to those two bridges, or with reference to the center line of those two bridges?

A. I have located the piling and the center line of the two bridges with reference to the base line, and the Government pier-head line, that is, the basis from which I worked; in other words, I made use of, as a basis from which I worked, the monument on the piers of the existing bridge; the entire survey is tied to that, those two existing monuments.

Q. Will you just describe, as briefly as you can, referring to Exhibit 10, what data you have taken from Exhibit 10 and extended on to your map? I ask you that, for the reason that you evidently did not have Exhibit 10 with you, and I want to be sure you have it all on there.

A. The data in Exhibit 10 is evidently taken direct from the Harden notes, and I have used the Harden notes in numbering the piles as located.

Q. The Harden notes appear to have no numbering, but they are the notes of survey which were put in evidence here and which have the heading 'Survey of Sacramento River, Location of Piles

(Testimony of H. A. Lathrop.)

at S. P. Bridge," and containing the name of R. C. Wilks, G. C. Harden? A. Yes.

Q. So you have located the data on your diagram concerning the piles from the Harden notes?

A. Yes. [213]

Q. You have shown, as I understand, the piling that is shown on your map, and I refer to the piling in the neighborhood of the location of the "Thor" as you have extended it on your map, from the Harden notes, and not from Exhibit 10?

A. Yes. I did not have Exhibit 10 to work from. I did have a copy of the Harden notes, which I understand were used in the preparation of Exhibit 10.

Q. They probably were.

A. Yes, those are the same piles, according to the notes.

Q. As shown on Exhibit 10? A. Yes.

Q. With reference to the diagram prepared by yourself, is it drawn to scale? A. Yes.

Q. Is the scale shown on the diagram?

A. The scale as shown on the diagram is 20 feet to the inch.

Q. What about the objects shown there, that is, the present bridge with the protection pier and the Pioneer Mill, and the other objects shown, as to whether they are shown there also drawn to scale?

A. They were drawn to scale located from an accurate survey, and where I have shown on the map co-ordinates they are co-ordinates of the Govern-

(Testimony of H. A. Lathrop.)

ment pier-head and bulkhead lines; that is co-ordinate to the same base.

Q. Referring now, Mr. Lathrop, to Exhibit "B," which was prepared by yourself and put in evidence at the previous hearing, you have shown, as I understand, these several plans that you put on this diagram from the Harden notes on both the diagram I have been questioning you about and on Exhibit "B"? A. Yes.

Q. And on Exhibit "B" you have shown the piles with reference to certain other matters shown on the diagram, to wit, labeled, "Level Considered Lowest Low Water as Referred to in Government Permit Dated June 11, 1895, 7.5 Feet, and Water Level July 12, 1918, and with reference to the zero mark on K Street gage." Is that correct?

A. Yes, that is correct.

Q. And the data, that is, with reference to the length of the several piles there, you also secured from what source? [214]

A. I secured it from Exhibit 10 and the Harden notes.

Mr. FORD.—We will ask that the diagram that I was first questioning the witness about, the one showing the center line of the two bridges and other data be marked Respondent's Exhibit "C."

Mr. HALL.—Do you offer that as probative evidence of the facts delineated thereon, or merely as illustrating this testimony?

Mr. FORD.—Merely as illustrative, and if there is no objection I will not question the witness about

(Testimony of H. A. Lathrop.)

each item, but let the data stand as his statement concerning the matter.

Mr. HALL.—I have no objection to it as being purely illustrative, but I have as substantive testimony.

Mr. FORD.—Q. Mr. Lathrop, with reference to the marks which are indicated by the words "Present bridge," what do those marks show?

A. It shows the center line of the existing railroad bridges at Sacramento.

Q. That bridge is shown on the lower part of the diagram? A. Yes.

Q. I find on one end of these marks "To San Francisco," and on the other end "To Sacramento." Does that show the direction of those two cities, generally, from the places indicated? A. Yes.

Q. With reference to the protection pier that is shown on the diagram extending out from "Present Bridge" in both directions toward the upper part of the diagram and toward the lower part of the diagram, is that drawn to scale and in accordance with measurements of the protection pier as it stands there? A. Yes.

Q. Now, then, getting up to the first line marked "C," does that mean center? A. C–L together.

Q. That is to designate the center line of the Sacramento-Yolo bridge, 1858? A. Yes.

Q. You have already stated how you arrived at that center [215] line? A. Yes.

Q. And the one just to the upper part of the diagram from the line I have just indicated, marked

(Testimony of H. A. Lathrop.)

"C–L of Central Pacific Bridge, 1878," you have already described how you got at that center line?

A. Yes.

Q. Now, with reference to the pencil-marks which you say are placed on there to show the "Thor," you took those, as you have already indicated, from Exhibit 10? A. Yes.

Q. And the piling that is shown in the neighborhood of the pencil-marks of the "Thor" from the Harden notes and not from measurements made by yourself? A. Those are from the Harden notes.

Q. Had you also made any diagram showing the river-bed at about the time the 1878 bridge was removed in 1895 or 1896? A. Yes.

Q. You based that on what data?

A. I based that on data on Exhibit 1.

Q. Just refer to what data on Exhibit 1 you are referring to.

A. From the portion of Exhibit 1 which is a photographic copy of a map entitled "Sacramento River for one-half mile each side railroad bridge at Sacramento, California, from the Government Records, office of W. H. Heuer, Major Corps of Engineer," with particular reference to soundings immediately below the easterly portion of the California-Pacific Railroad bridge.

Q. Will you produce that map or diagram, please? A. Yes.

Q. Now, on the diagram you have produced, you have shown the same data that you have shown on Exhibit "B," with the additional river-bed line in-

(Testimony of H. A. Lathrop.)

dicated by you? A. Yes.

Q. That is the only new information contained on this map I have just shown you?

A. That is the only change, the river-bed line, and the notation referred to.

Mr. FORD.—We will ask that this last diagram be marked Exhibit "D."

Mr. HALL.—To illustrate the testimony? [216]

Mr. FORD.—Yes, just to illustrate it.

Q. As I understand you, the line which you have shown here on Exhibit "D" to indicate the river-bed in 1895–6 is already shown in the data contained in Exhibit 1, but is not extended on to any diagram so as to illustrate it?

A. Yes, it is shown, but it is shown merely as depth I have merely shown it in diagrammatic form.

Q. You have shown the line on this diagram so that the distance from the top of the piles indicated in the Harden notes was shown here? A. Yes.

Q. To the river-bed, as it existed in 1895–96?

A. Yes; it shows that distance to scale; in no case is it specified or written out.

Q. Taking a rule, it could be measured?

A. Yes, it could be measured.

Mr. FORD.—That is all.

Cross-examination.

Mr. HALL.—Q. Mr. Lathrop, in making the plat which you have called Respondent's Exhibit "C" there is no material difference between the location of the piles you have indicated and the location of

(Testimony of H. A. Lathrop.)

the "Thor" as you have drawn it in black pencil from the location of the same piles and the vessel "Thor" in yellow on Libelant's Exhibit 10, except that they are drawn to a different scale?

A. Yes, simply a different scale.

Q. All of the rest of the objects are the same, are they not? A. Apparently.

Q. So that this Exhibit 10, when considered upon the scale upon which it was drawn, shows exactly the same thing as your Exhibit "C" drawn to its scale?

A. As far as the location of the draw, protection, piles and the dredge "Thor."

Q. That is true, is it not, also as to this cross in pencil on the corner of the Pioneer Warehouse on Exhibit 10? [217]

A. Yes, assuming that it is the Pioneer Warehouse.

Q. Assuming that this right-angle line on the right-hand side of the plat where the cross in pencil is is the corner of the Pioneer Warehouse?

A. Yes.

Q. It is all relatively the same? A. Yes.

Q. So that we have in Exhibit 10 and in your plat C, the only difference being a different scale, a little more detail projected on your plat?

A. Yes.

Q. In other words, you have not, by your plat C here, shown that we incorrectly located the piles and the "Thor" on our plat 10?

A. No; as I understand it, they are located from

(Testimony of H. A. Lathrop.)

the same sources of information.

Q. And the same data, only your plat is a little bit bigger?

A. Yes; also our plat shows the location of the back site.

Q. Yes, the location of the back site, but that does not vary our Plat 10 at all? A. No.

Q. Now, then, you have the line of the 1858 bridge. You got that from the piles on the Yolo side and on the Sacramento side? A. Yes.

Q. And that is correctly delineated on your map?

A. Yes.

Q. Now, may I ask this question: Is it not a fact that the ends of the 1878 bridge and the 1858 bridge on the Yolo County side were a little bit nearer together than were the ends of the same bridges on the Sacramento side?

A. Apparently; there seems to be a little spread.

Q. In your plat which is Respondent's Exhibit "C," you have not attempted to indicate the piers of the 1858 bridge as they cross the river A. No.

Q. You have no information as to that, or data by which you could properly locate them on Exhibint "C"? A. No definite information.

Q. I notice that you have not located on your 1878 bridge the center line of your 1878 bridge, on Exhibit "C," any of the piers except the pier-head on the Yolo side and the bridge-head on [218] the Sacramento side. That is all?

A. That is all.

Q. Now, I want to call your attention to Libel-

(Testimony of H. A. Lathrop.)

ant's Exhibit 2A: Is it not a fact that the center line of the 1878 bridge, as we have depicted it on our Exhibit 2A, our big plat, is the same, when scale is considered as your plate Exhibit "C"?

A. It is apparently the same; wouldn't you say they were practically the same?

A. It is run to the center line of the same piles on the Sacramento side and the center line of the same pier near the Yolo shore.

Q. And the "Thor" is shown in practically the same position on our Exhibit 2A as it is upon your Exhibit "C"?

A. Yes, using the same information.

Q. I notice, referring to Libelant's Exhibit 2A a large cluster of piles here in the bow of the "Thor," and above the center line of the 1878 bridge. That cluster of piles is not shown at all in your Exhibit "C," is it?

A. No. It is not shown on the exhibit.

Q. You had no data whatever with reference to that cluster of piles by which you could place it upon your plat, except from this Exhibit 2A of the libelant?

A. No, it is not shown in the Harden notes, nor in Exhibit 10, from which I made it.

Q. Now, referring also to the group of three piles shown on Libelant's Exhibit 2A, just below and possibly a little to the left of the large group of piles that we have just been talking about, that is not shown on your plat C nor on Libelant's Exhibit 10? A. No.

(Testimony of H. A. Lathrop.)

Q. So that those were evidently piles that were not discovered by Harden in his survey there?

A. Yes.

Q. And you had no data, except our Exhibit 2A, by which you could put them on your plat Exhibit "C"? A. No.

Q. The other piling which we have shown in Exhibit 2A practically conform to the piling which you have put upon your Exhibit "C," do they not?

A. They appear to agree, as far as can be determined without a detailed examination. [219]

Q. Now, in your Exhibit "D," it is the same as your Exhibit "B," except that you have placed there on the level of the river as taken from Libelant's Exhibit 1? A. Yes.

Q. Which was the certified copy from the War Department? A. Yes.

Q. Neither does Exhibit "D" show the large group of piles in the bow of the "Thor," which is shown upon Libelant's Exhibit 2A and which has not been shown upon your Exhibit "C," nor upon Libelant's Exhibit 10?

A. It shows only such piles as are shown in the Harden notes. As an explanation, I desire to call your attention to the fact that in the Harden notes, pile No. 16 is shown as a cluster of piles; in other words, it is one pile in a cluster. Having no information besides the cluster, I did not put it on.

Q. As to this Exhibit "D," showing the bottom of the river, according to the War Department plat in 1895, have you run down the records to see

(Testimony of H. A. Lathrop.)

whether or not, in the past years, the bottom of the river has been dropping there right along?

A. Our records show that the channel of the river is constantly changing, and that it is, at the present time, lower than it was at that time.

Q. Even to-day, at the present time, it is lower than it was in 1895 when this Government chart was made? A. Yes.

Q. Isn't it a fact, also, from your records, that ever since back in the '80's, when dredging was stopped up in the placer regions of California, that the bottom of the Sacramento River at Sacramento at the site we have under consideration has been scouring down and lowering right along?

A. Yes, it has been lowering somewhat.

Q. And that lowering commenced at a period some years prior to the time when the 1895 bridge was taken out, did it not?

Mr. FORD.—You mean the 1878 bridge?

Mr. HALL.—The 1878 bridge, which was taken out in 1895.

A. Our records, so far as I have been able to get them, do [220] not extend back that far; our records were destroyed.

Q. Haven't the Government engineers some records down here that will show?

A. The Government records will show that information.

Q. Might I ask you to casually examine those records and be able to tell us this afternoon whether or not the bottom of the river hasn't ac-

(Testimony of H. A. Lathrop.)

tually been dropping, for say a period of from five to ten years prior to 1895, and that that lowering of the bottom of the river has continued on down until the present day? Will you also find out for me whether or not the bottom of the river has not been dropping continuously since 1895?

A. Yes.

Testimony of G. F. McCormack, for Respondents.

G. F. McCORMACK, called for the respondents, sworn.

Mr. FORD.—Q. What is your business or occupation, Mr. McCormack?

A. Assistant Division Engineer at Sacramento of the S. P. Company.

Q. Now, this work, concerning which Mr. Lathrop has just testified was done under your supervision? A. Yes.

Q. But you did not do the work yourself?

A. No.

Q. Mr. Lathrop is in your Department?

A. Yes.

Q. So that you have no personal knowledge concerning the matters he has testified to?

A. I am familiar with it.

Q. You are familiar with the matter generally, but Mr. Lathrop actually did the work?

A. Yes.

Mr. HALL.—No questions.

Testimony of A. W. Stetson, for Libelant.

A. W. STETSON, called for the libelant, sworn.

Mr. HALL.—Q. Mr. Stetson, what official position, if any, do you occupy with the Olympia Dredging Company? A. Secretary.

Q. How long have you been secretary of that company? A. Since it was incorporated. [221]

Q. How many years? A. July 1, 1915.

Q. As such secretary of the company, do you have custody and control of the accounts, and books, and records of the company? A. I do.

Q. During 1918 your company had a dredger known as the "Thor"? A. Yes.

Q. You have heard of the accident to the "Thor" on the night of July 13, 1918? A. I have.

Q. Did you know afterwards that the "Thor" was taken to the drydock and repaired? A. She was.

Q. Do the records of your company show that certain repairs and expenditures were made upon the "Thor" in raising her and repairing her so that she could be floated at Sacramento and be taken to the drydock at San Francisco and be repaired?

A. The records so show.

Q. Have you kept an accurate account of the amounts that were expended in raising and repairing the "Thor" so that she might be floated, transporting her or towing her from the scene of the accident to the drydock in San Francisco, and repairs made upon her in the drydock at San Francisco, and the return of her to her scene of operations in the Sacramento River?

(Testimony of A. W. Stetson.)

A. We have kept a complete record of it.

Q. Have you that record with you? A. I have.

Q. Will you produce it, please? A. Yes.

Q. You have an envelope here that is marked Exhibit "A." Will you state to the Court what these papers are?

A. Exhibit "A" is made up of the cost of repairs to dredger, aggregating $6,417.84; it is made of a number of miscellaneous charges, being supported by duly receipted vouchers.

Q. And those vouchers which you have attached or which are supporting Exhibit "A" are vouchers of your company kept in the regular course of business, are they not?

A. By our accounting department.

Q. And the various sums making up the total of $6,415.84 have been actually expended by your company for the purposes stated [222] on that account? A. They have.

Q. And they are all bills rendered by the people who performed the work by your company and by your company vouchered and paid for in the regular course of business?

A. Yes, as shown by these vouchers.

Mr. HALL.—We desire to offer in evidence the vouchers as Libelant's Exhibit 14.

Q. Now, your Exhibit "B," will you please explain that to the Court?

A. Exhibit "B," totaling $702.98, is for the expense of bringing the dredger to the drydock at West Alameda, as supported by the vouchers of the

(Testimony of A. W. Stetson.)

Sacramento Transportation Company in like amount.

Q. That was handled and paid in the way you have described to Exhibit "A"? A. Yes.

Mr. HALL.—We offer that exhibit in evidence as Libelant's Exhibit 15.

Q. Now, Exhibit "C"—will you explain what that is?

A. Exhibit "C" totals $6,260, and is for the expenses as shown by the vouchers of the Bethlehem Shipbuilding Corporation; the vouchers are attached to the exhibit.

Q. What were those sums expended for?

A. They were expended for labor and materials, in repairs to the dredge after sinking at Sacramento.

Q. Were those the injuries that were occasioned by reason of this accident?

Mr. FORD.—That is objected to upon the ground it would be hearsay.

Mr. HALL.—All right.

Mr. FORD.—I have no objection to his showing what they did, but I take it he has no personal knowledge.

Mr. HALL.—Those items were handled and paid in the usual course of business which you have already explained?

A. Yes, as supported by the receipts.

Q. And at the dates stated in the statement that you have rendered? A. Yes. [223]

(Testimony of A. W. Stetson.)

Mr. HALL.—We offer that in evidence as Exhibit 16.

Q. Exhibit "D," please explain to the Court what that is.

A. Exhibit "D" is for $270, and is for towing the dredger after she was repaired at the drydock back to the Government work, again and paid by us to the Crowley Launch & Tugboat Company, and the supporting vouchers is attached, which is receipted.

Q. That was handled and paid in the same manner? A. Yes.

Mr. HALL.—We offer that in evidence as Libelant's Exhibit 17.

Q. Exhibit "E," please explain what that is.

A. The original of Exhibit "E" seems to have been removed.

Q. This copy that you produce is an exact carbon copy of the original which you made out?

A. Yes; it amounts to $5,323.49, and is the loss in earnings that the dredger sustained by reason of her sinking at Sacramento; it is computed by taking three months prior and three months after the sinking, based on the rates that she was receiving from the United States Government, Colonel L. H. Rand, as supported by our contract with Colonel L. H. Rand.

Q. Have you a copy of the contract?

A. I have only the original contract.

Mr. HALL.—May we at some future time withdraw that and substitute a copy of the contract?

(Testimony of A. W. Stetson.)

A. Mr. FORD.—Yes.

Mr. HALL.—That is the original contract to which you have attached this account, which shows the rate at which the United States Government was paying the Olympia Dredging Company for the hire of the "Thor" during this period?

A. Yes.

Q. It was upon those rates of hire and that compensation which you were receiving under that contract that you computed the loss of and the earning capacity of the "Thor" during the period of the accident and up till she was returned to her work in the river? A. Yes.

Q. And that compensation amounts, according to your figures, to some $5,323.49?

A. It does. [224]

Q. You are familiar, are you not, with the rate of compensation that has been received and was being received during that period of time by the Olympia Dredging Company for the hire of the "Thor" and other clamshell dredgers? A. I am.

Q. Is the rate of charges and compensation, as expressed in this contract, and which forms the basis of your compensation here, a reasonable and just charge and rate? A. It is.

Q. Was that the going rate in that vicinity at that time? A. It was the tariff rate.

Q. How was that fixed, by the Government, or by you people?

A. In a contract entered into between the Olympia Dredging Company and Colonel L. H. Rand, of

(Testimony of A. W. Stetson.)

the United States Government, based on the current going rates.

Q. State whether or not you do know from your personal knowledge and from the records of the corporation, kept in the usual and due course of business, that the "Thor" was incapacitated for work during the time stated by you in this account which you made up and you have called Exhibit "E"?

A. Yes. This rate is made up by the running time of the dredger as actually computed 3 months prior and 3 months after the sinking.

Q. But I want to know, Mr. Stetson, whether you know of your own knowledge, or from the records of your company, kept in the due course of business, that the "Thor" was actually off of the work during that period of time?

A. I do know it from the daily log sheets.

Q. Those daily log sheets are reports that are sent in by the captain of the "Thor" to your office?

A. Yes.

Q. And they are kept in the usual and due course of business of your company? A. They are.

Q. Is that an established record which is required to be kept by your company?

A. Yes, daily reports of daily operations.

Q. You are the custodian of that record?

A. I am.

Q. Do your records show, from this log that the "Thor" kept, that an accident occurred in the Sacramento River? A. They do. [225]

(Testimony of A. W. Stetson.)

Q. Do they show that from time to time boats, and men, and labor, and divers were hired and employed to repair her at that time?

A. The daily log sheets show the operations of the dredge, state that the dredge was sunk during those days, and that steamers were standing by; we do not go into detail as to just what the steamers did.

Q. Do your log sheets show that she was towed to the drydock, and repaired at the Bethlehem shipbuilding Company? A. They do.

Q. And she was afterwards returned by the Crowley Launch Company to the scene of operations in the Sacramento River? A. They do.

Mr. HALL.—I offer these two large envelopes as Libelant's Exhibits 17 and 18. That is all.

Cross-examination.

Mr. FORD.—Q. Mr. Stetson, this work that the "Thor" was doing for the Government was paid for by the day, or how? A. By the hour.

Q. What rates did you receive per hour for the "Thor"? A. I would have to refer to—

Q. (Intg.) It is shown there?

A. In the contract, yes.

Q. Was that a gross sum per hour, or did that include your furnishing men and materials?

A. The dredge, in complete running order.

Q. Now, in making your estimate there, have you deducted, in arriving at the reasonable value, the wages of men and the cost of materials, or are they included?

(Testimony of A. W. Stetson.)

A. They are included, because the crew and the complete outfit was on duty all the time, just as if it was operating.

Q. That is, you had the same expense during the time she was laid up as you had before?

A. Yes, practically the same thing.

Q. Including the expense for oil and whatever materials were used?

A. In the matter of oil, there might have been a day or two, or a few days, that she was under water, that no oil was used, but water got into the oil and so we thereby lost some. [226]

Q. Have you any data concerning the average depreciation or whatever you call it in the "Thor" per day while it is working?

A. The accounting department might have something on that.

Q. How long before this accident had the "Thor" been in drydock? A. I could not say.

Q. You have some record of that, have you not?

A. I assume we have that in the accounting department.

Q. How often do these dredgers have to be overhauled?

A. It varies according to the character of work the dredge is doing, and the age of the dredger; it is customary with us to maintain repairs all the time, keeping the plant up to its efficiency; that work is usually done on Sundays.

Q. The boats have to go to the drydock occasionally, don't they? A. Yes.

(Testimony of A. W. Stetson.)

Q. You have no information as to how long a dredge ordinarily operates before having to be taken into the drydock? A. No. I have not.

Q. You have no information concerning the condition of the dredge on the date of the accident, prior to this accident? A. No, I have not.

Q. Now, you spoke of the log concerning certain data. Where is the log containing the data with reference to this accident?

A. It is in the accounting department; all the dredger logs.

Q. We would like to refer to it, as to what it says what happened to the "Thor." Do you remember what time it says that the "Thor" went on the piles?

A. I do not recall it. The log sheet, I think, will show the date.

Mr. HALL.—We can bring them up.

Mr. FORD.—Yes, I would like to see the log.

Mr. HALL.—Those are daily reports.

Mr. FORD.—They keep a log. I want to show what the men in charge of the boat said about what time she went on the piles and where.

(A recess was here taken until two o'clock P. M.)

[227]

AFTERNOON SESSION.

Testimony of William Hood, for Respondents.

WILLIAM HOOD, called for the respondents, sworn.

Mr. FORD.—Q. What is your business or occupation, Mr. Hood? A. Civil Engineer.

(Testimony of William Hood.)

Q. With what concern are you associated at the present time?

A. The Southern Pacific Company.

Q. Have you been in the employ of the railroad, that is, in the employ of some railroad company for a number of years?

A. Yes, since the 3d day of May, 1897.

Q. You had nothing to do with the construction of either of the bridges that crossed the river prior to 1895, did you? A. No.

Q. Now, Mr. Hood, were you acquainted in a general way with the bridge that was across the Sacramento River prior to 1878?

A. Yes, by casually observing, and riding across it on trains.

Q. Were you familiar with the bridge that was constructed there about 1878?

A. Only in that way.

Q. Do you remember of a new bridge they constructed there in about 1878? A. Yes.

Q. You passed over it, did you?

A. After it had been constructed, yes.

Q. Now, the bridge that was there, the one you first knew, the one that was prior to the 1878 bridge, do you recall about how it was used, as far as wagons, and trains, etc., were concerned?

A. It was used for trains and wagons on the same level, and the floor of the bridge planked over each side of and between the rails to facilitate that use.

Q. Now, with reference to the bridge that we will refer to now as the 1878 bridge, the new bridge that

(Testimony of William Hood.)

was built there about 1878, do you recall whether or not that was also used as highway?

A. Yes. [228]

Q. During the period just prior to 1878, and for a good many years thereafter, what company did most of the railroad construction here in California?

A. The Pacific Improvement Company, as a contractor.

Q. Up to about what period did it continue actively in railroad construction?

A. I think till about 1913, or thereabouts.

Q. Now, during that period, from a time prior to 1878 up to, say, near 1900—from 1875 to 1900, did the Pacific Improvement Company do a considerable amount of work for the companies operating the road between Sacramento and San Francisco?

A. Yes; they undertook sometimes isolated pieces of construction and reconstruction, and frequently undertook large pieces of original construction.

Q. The Pacific Improvement Company was equipped to handle such work, was it?

A. Yes, it would sometimes be equipped to handle a piece of railroad construction that the railroad company was not equipped to handle.

Q. How about bridge construction?

A. The same would apply to bridge construction, in some instances.

Q. The reason I am asking this is that some of the evidence shows that the P. I. Company did

(Testimony of William Hood.)

certain work that we have been discussing here.

A. Yes.

Q. You were an engineer in the employ of a railroad operating this line between San Francisco and Sacramento during a considerable period, were you not?

A. I was engineer in the employ, sometimes, of the Central Pacific Railroad Company, and sometimes the Southern Pacific Railroad Company, one or the other of which companies operated and built roads until the Southern Pacific Company was organized, and I then became a chief engineer of the Southern Pacific Company, which leased, operated and constructed railroads.

Q. The Southern Pacific Company, and I will refresh your recollection, was incorporated on March 17, 1884. Does that about correspond with your recollection?

A. I should say I first became acting chief engineer, and some months afterwards [229] was formally made chief engineer of the Southern Pacific Company.

Q. In your work as chief engineer of the Southern Pacific Company, you did not have occasion, or did you have occasion, to construct a new bridge over the Sacramento River in 1895 and have anything to do with the old one?

A. No, that was done by the maintenance forces as a reconstruction of the existing facility or replacement.

Q. Refreshing your recollection from the permit

(Testimony of William Hood.)

of the War Department here, there was a permit granted to the California Pacific Railroad Company about 1895, to have constructed a new bridge over the river, and the permit required the old 1878 bridge to be taken out. As I understand, you had nothing to do with either of those jobs, personally?

A. No.

Q. So that you know nothing as to whether the old bridge was taken out according to permit or not?

A. No. I will say that the permits for bridges are always to the corporations, not necessarily to the leasing and operating companies.

Q. The Southern Pacific Company had leased this road from some period back shortly after its incorporation, did it not? A. Yes.

Q. We have in evidence a lease under date of, I think, 1886, that would be two years after its incorporation, covering this particular part of the road.

A. These permits are always from the Government to the corporation owning the road.

Q. Owning the road, not to the leasing corporation?

A. Not to the leasing corporation or the operating corporation.

Cross-examination.

Mr. HALL.—Q. When did you become familiar with the situation at Sacramento, as to the number of bridges that crossed the river?

A. I was never familiar with it as a matter of

(Testimony of William Hood.)

anything I had to handle.

Q. But from your own personal standpoint?

A. The first that I knew of the railroad bridge which we will say was the 1869 bridge, was late in 1869. [230]

Q. You had never seen that bridge when it was being used exclusively as a wagon-road bridge?

A. Never excepting casually; I was familiar with the Sacramento waterfront from early in May, 1867, but have no particular remembrance of the matter you mention.

Q. Did they have a bridge in 1867 when you first went there? A. Yes.

Q. It was then known as the Sacramento and Yolo bridge?

A. I could not answer that question.

Q. The same bridge that you found there, or knew of being there in 1867 was afterwards used as a railroad bridge?

A. I can only give you my impression, that it was on the same site and was radically reconstructed, in the way of being made stronger, so much so that in riding over the bridge for the first time on a railroad train I was uncertain but what it was an entirely new bridge, there was so much new timber in it.

Q. But your impression is it was of new construction?

A. Yes, an impression, with that statement.

Q. What railroad was it that was operating trains across that bridge and operating the bridge

(Testimony of William Hood.)

when you first knew it as a railroad bridge?

A. The railroad was the California Pacific Railroad.

Q. The California Pacific, as I understand it, operated the line of railroad from Vallejo Junction into the city of Sacramento?

A. From Vallejo via Napa Junction to Suisun, and into Sacramento, and from Davis via Woodland and Knight's Landing into Marysville.

Q. And that, necessarily, would mean that they operated this bridge, or operated these trains across this bridge?

A. I will say yes, to the extent that I rode across the bridge on one of their trains.

Q. The construction that we have been talking about, having been done by the Pacific Improvement Company, will you explain exactly the relation between the Pacific Improvement Company and the California Pacific in its reconstruction and repair of that bridge from time to time?

A. I had nothing to do with [231] that, but I will state for information, that the Pacific Improvement Company ordinarily took contracts for building entire railroads complete, including rolling stock, and in some cases the Pacific Improvement Company took contracts for building a single structure, as, for instance, the bridge across the Sacramento River of 1878, or as, for instance, rebuilding several miles of railroad where it was desired to improve it. That is, they would take a contract with the existing corporation for a construction,

(Testimony of William Hood.)

the same as any other contractor would take a contract.

Q. But they did build that 1878 bridge for the California Pacific Railroad Company in 1878?

A. You asked me if they did so. I have understood they did so.

Q. And that understanding you gathered from your intimate association with the company?

A. Yes.

Q. And as an engineer of the Southern Pacific Company?

A. For instance, I was in San Francisco at that time, and I understood that this bridge that you refer to was framed in the yard at West Oakland; I understood so.

Q. And was the yard of what company?

A. It was the yard, I think, of the Central Pacific Railroad Company; that is my impression.

Q. And the Central Pacific and the California Pacific were being operated together from San Francisco to Ogden, Utah, as one road at that time, were they not?

A. Exactly, after the road was completed from Benicia to Suisun, but not until then.

Q. That road was built from Benicia to Suisun when?

A. I would think it was between, somewhere between '78 and '80; I am at a little loss on that, as I was not connected with the construction; I was in New Mexico at that time, and Arizona.

Q. Were you connected with either company in

(Testimony of William Hood.)

1878 when the old 1869 bridge was torn down?

A. Which company?

Q. Either the California Pacific or Central Pacific, or the Northern Railway?

A. In 1878 I was working for the Southern Pacific Railroad of California. It is a part of the same system. [232]

Q. Part of the same system? A. Yes.

Q. Did your jurisdiction extend over the bridges at Sacramento at that time?

A. No. In 1878 I had nothing whatever to do with Central Pacific or California Pacific Railroad matters.

Q. In 1878 did the California-Pacific operate the trains over the bridges at Sacramento?

A. My remembrance is that the Central Pacific Railroad operated the trains.

Q. But the California Pacific owned the line of railroad? A. Yes.

Q. When you spoke about the P. I. Company building an entire new railroad, or branches, or bridges, it would simply do that as a contractor?

A. Absolutely.

Q. With the owning railroad company?

A. Yes, absolutely.

Q. So that if the P. I. constructed the 1878 bridge over the Sacramento River at Sacramento, it did it primarily for the California Pacific Railroad Company?

A. Entirely so, as a contractor must have; the

(Testimony of William Hood.)

Pacific Improvement Company was not a railroad corporation.

Q. Now, do you know, of your own personal knowledge, anything about the destruction of the 1869 bridge, which occurred in 1878? A. No.

Q. When the new bridge was constructed?

A. No.

Q. Do you know anything of your own personal knowledge, or as an official of the Southern Pacific Company, in regard to the destruction of the 1878 bridge in 1895 and 1896?

A. No, I had nothing to do with it.

Q. You had no personal supervision of that?

A. No.

Q. Do you know what company destroyed it?

A. No, I do not. I could only give you an impression, which would not be worth very much.

Q. Now, the Southern Pacific Company has been an operating company of all of the lines of railroad crossing the Sacramento River at Sacramento since 1886? A. That is my understanding of it.

Q. Did you know, in the past, of a company known as the Northern [233] Railway Company? A. Yes.

Q. Will you tell us what company that was?

A. The Northern Railroad, as I remember it, started at a point a little north of Woodland—I may get the exact name of the corporation a little wrong, but my remembrance was that railroad started a little north of Woodland and went up to Tehama.

(Testimony of William Hood.)

Q. It did not cross the Sacramento River at Sacramento? A. No.

Q. Was it an allied corporation of the Southern Pacific?

A. No; it was a corporation owned by, I think, the Southern Pacific Railroad; it may possibly have been the Central Pacific Railroad; I would not be certain.

Q. But it was operated in conjunction with these other lines of the California Pacific and the Central Pacific, and the Southern Pacific Railroad?

A. Yes.

Testimony of H. L. Demeritt, for Respondents.

H. L. DEMERITT, called for the respondents, sworn.

Mr. FORD.—Q. Where do you reside?

A. I sleep in Berkeley.

Q. What is your occupation?

A. Civil engineer.

Q. How long have you been such?

A. 48 years.

Q. Formerly, did you have something to do with the Government boat that was engaged in cleaning out the Sacramento River?

A. The Government snag boat, yes.

Q. During what years?

A. Continuously from 1890 to 1900, and then I had charge of it, but not on the boat, up to 1908, I think.

Q. The period I am going to ask you about is

(Testimony of H. L. Demeritt.)

from 1890 to 1900. Do you recall the time that the bridge was taken out at Sacramento about 1895 or 1896? A. Yes.

Q. Did you have anything to do with the removal of the piles when the bridge was torn down there?

A. Yes.

Q. Will you state what was done?

A. We usually were notified or requested to remove snags or piles that were known by the [234] transportation companies; they were running on the river all the time, and if their captains discovered a snag or piles, or any obstruction in the river, they usually notified the engineer's office, and I was notified on the boat where those were; then we always made it a point to remove all such obstructions as were reported.

Mr. HALL.—May I interpose an objection that the question here is not a matter of custom or habit, and the only testimony that is competent in this case is as to the matter of what was done in the present case, to wit, the removal of the piles of the 1878 bridge.

Mr. FORD.—Q. Referring now to what you did with reference to the removal of those piles of the old bridge that was torn out at Sacramento about 1895 or 1896, will you state what was done?

A. What was the question?

Q. Will you state what you did with reference to taking out the piles of the old bridge there at Sacramento in 1895 and 1896?

A. I went there with the snag-boat and blasted

(Testimony of H. L. Demeritt.)

out some piles, and why I remember it is because the superintendent of the flour-mill, after I started blasting there, he complained that I was jarring the mill, and I replied to him that I was not shooting, I thought, enough to do him any harm. That is why I remember the circumstance of blasting out the piles.

Q. What did your equipment consist of in doing that work of blasting out those piles?

A. Our equipment on the snag-boat was such that we could pull piles, or we could shoot out the piles, which in a case like that we usually did where there was a bunch of them we shot them off with giant powder.

Q. In this instance you did shoot them off, did you?

A. I know I did shoot them off there, on some of these piles, yes.

Q. What means did you have of locating the piles that you were to shoot off?

A. We had poles on the snag-boat; we probably would have six or eight poles put down forward, and when the poles struck any obstructions we would stop the boat [235] there and then we usually sent a diver down to examine.

Q. What did your crew consist of on your boat?

A. We usually carried nine divers for the purpose of going down and making fast to anything, or locating anything.

Q. On this particular occasion, that is, the removal of these piles there in the neighborhood of

(Testimony of H. L. Demeritt.)

the old Pioneer Mill, is that it?

A. I think that was the name of it?

Q. Did you follow your usual practice in sending your men down? A. Oh, sure, yes.

Q. Now, in blasting these piles, is there any particular place with reference to the river-bed that they will usually break off?

A. We put our powder right on the bed of the river and cut them off; that is what our object was, to cut them off at the bed of the river.

Q. In putting your powder at the bed of the river, where, usually, will it break the pile off?

A. It will break the pile off right where we put the powder.

Q. Have you any personal knowledge as to the bed of the river at about that time, 1895 or 1896 in that location?

A. About the depth of water?

Q. Yes.

A. Well, from my recollection, and knowing the river along there, I would have said it was around nine feet deep, eight or nine or ten.

Q. You say your recollection is it would be about nine feet, something of that kind?

A. Nine feet of water.

Mr. HALL.—May my objection be renewed to all of this for the reason of the permit did not relieve the respondents from freeing the channel from all menace to navigation.

Mr. FORD.—Yes.

Q. Now, Captain, referring to Exhibit "D" in

(Testimony of H. L. Demeritt.)

this case, which you have before you, I call your attention to the water level on July 12, 1918, as shown on this diagram, and the river bed as it existed in 1895 and 1896, as shown by the Government permit issued for the building of the bridge in that year. Have you any recollection concerning the river-bed as it existed [236] in about 1895 in that location. That is the bed of the river, not the water level.

A. I am saying that according to my recollection there was about 9 feet of water.

Q. Was the bed at that point level or otherwise?

A. Up and down stream it was practically level; of course, a cross-section, it would not be level.

Q. After your men finished the work there of blasting these piles, what was the situation in the bed of the river, so far as piles were concerned? Were they taken off at least to the bed of the river?

A. Yes.

Q. Now, on another matter, Captain, what change, if any, was there from year to year in the river-bed in that location? Did it remain the same each year, or did the stream change?

A. It changed a good deal from year to year.

Q. Do you remember about what year it was that weir was put in up there?

A. You mean the jetty?

Q. Was there a jetty put in there some time during that time?

A. Yes, there was a wing dam put in above the bridge, and I would say it was 1892 or 1893; we

(Testimony of H. L. Demeritt.)

put a wing dam up above that bridge to make water in the draw.

Q. Was that while you were captain of the boat, or afterwards?

A. While I was on the boat. I will have to qualify my answer. I was on the boat up to that year, up to say September, and then Lieutenant Fitch was here and went on the boat and completed the season with the boat; that was 1892 or 1893; I went up with Colonel Heuer and located a dam above the bridge and Lieutenant Fitch put the dam in with the aid of the snag-boat.

Q. Now, what was the situation there at the bridge prior to the time you put in that wing-dam in 1892 or 1893?

A. There was 2 feet 9 inches of water.

Q. What effect did the wing dam have?

A. It scoured it out, of course; that is what we put it in for. [237]

Q. Now, you stated a short time ago that the channel there had changed from time to time during the time you had been acquainted with the river there. To what extent does it change each year? I mean in what way does it change?

A. As an illustration of that, after the Payne break occurred down below Sacramento, I think that was 1889, and the fall after the Payne break went out, there was very deep water in the draw-span of the bridge, because the sand had washed out, and there was 20 feet of water in front of Sacramento; it was on account of the Payne break

(Testimony of H. L. Demeritt.)

creating a strong current and washing the sand out.

Q. How deep was the water in the channel at that time, if you know?

A. Well, I don't know. 1889 was my first connection with the river. After the Payne break, three or four years afterwards, it showed up to about eight feet in front of Sacramento in the channel.

Q. So that the record will be straight, what do you mean by 8 feet?

A. Eight feet deep of water.

Q. The river at that point, in the neighborhood of the place where these piles were removed from the river—did the river-bed there consist of sand or some more substantial matter?

A. No, it is all sand, sand and sediment; very little sediment, mostly all sand.

Q. Now, you have not been acquainted with the river there the last few years, have you?

A. No, I have not.

Mr. FORD.—That is all.

Cross-examination.

Mr. HALL.—Q. What year was this Payne break that you speak about?

A. It was about two miles below the city of Sacramento, a little short of two miles.

Q. What year was that?

A. I think it was in 1889; that is my recollection.

Q. Then it was before you removed these piles in 1895?

(Testimony of H. L. Demeritt.)

A. Oh, yes, a long time before. I was just illustrating how the river had changed up there.

Q. Now, you spoke of a wing dam that you constructed in 1892 or 1893. Where was that wing-dam with reference to the then [238] existing bridge?

A. I would say it was about 250 feet above the bridge to-day, the outer end of it next to the channel, because it had an incline downstream.

Q. Which side? A. On the Yolo side.

Q. On the Yolo side? A. Yes.

Q. So that none of it extended beyond the center—

A. (Intg.) It extended out to about the line of the west rest pier.

Q. Of the west rest pier? A. Yes.

Q. Then there was no possibility that any portion of that wing dam extended out beyond the old drawbridge of the 1878 bridge?

A. No. That was to make water in the draw-span.

Q. So that none of the piling from that wing-dam could possibly have been over—

A. (Intg.) It never was over to the channel.

Q. It was never over to the channel at all?

A. No.

Q. What was the effect of that wing dam on the channel?

A. Well, it made plenty of water for navigation.

Q. Did it throw that water for navigation toward the Sacramento side? A. Yes, it would.

(Testimony of H. L. Demeritt.)

Q. Its tendency was, then, to deepen the channel toward the Sacramento side?

A. Well, not as extensive as that. It was put in there to cause the flow of water through the draw-span of the bridge, so that the steamboats and barges would have enough water to float.

Q. Do you remember when the 1895 bridge was built from Harriet Street? A. Yes.

Q. The channel of the stream had moved out over toward the Sacramento side, had it not?

A. I think it had, yes.

Q. Do you remember, Captain, that the draw in the 1895 bridge was nearer the Sacramento side than the draw in the 1878 bridge? A. Yes.

Q. And the reason they had to move that draw in the 1895 bridge was because the channel had moved nearer to the Sacramento shore, was it not?

A. It was considered better located for the channel.

Q. And the channel then did run through the draw of the 1895 bridge? A. Yes. [239]

Q. And after that time your work on the snag-boat for the Government to maintain that channel and keep it free for navigation?

A. Maintain the channel as we found it where the steamboats run.

Q. Captain, how did you come to take the snag-boat up to blow out these piles on the 1878 bridge, that you blew out in 1895?

A. I don't know, but I might say the general practice was for the railroad company or the steamboat

(Testimony of H. L. Demeritt.)

company to notify the engineers' office of obstructions in the river, and when they did those instructions were sent to me, notifying me of obstructions in certain places and to take them out.

Q. If the foreman of the bridge testified that the Southern Pacific Company sent down there for the snag-boat or somebody from the snag-boat to blow up those piles, you would say in all probability that was the way it happened, would you not?

A. Oh, sure, but I said usually. Now, sometimes the captains on the boat, or any man interested in the bridge or the water way would notify us, and we would accept that as requiring us to examine it and see whether there was an obstruction, and if there was to take it out.

Q. Do you remember of having any instructions from your superior officer in the Government service at that time to blow up these?

A. No, I can't remember it, because I say the usual custom was—I know after that we notified the companies that if they had any obstructions, knew of any in the river, to send written notice to the engineers' office. Now, I take it, I know that if we did not receive notice of it in that way, if the bridge-tender had called our attention to the fact that there was an obstruction up there, we would probably examine it.

Q. Is it not a fact that sometimes you required individuals to take out these obstructions that they had left in the river?

A. I do not recall any instance, but that does often

(Testimony of H. L. Demeritt.)

occur in the engineers' office, that they notify parties that have left obstructions in the river to remove them.

Q. To refresh your memory, don't you know that there is an [240] Act of Congress providing for proceedings by which the United States Attorney, on the suggestion of the engineers' office may bring suit against persons to compel them to remove obstructions to navigation in the river?

A. Well, would that refer to wrecks, that you are talking about?

Q. It refers to wrecks, and piles from wharves, or piles from any superstructure that has been built across, or any construction across the river, bridge or trestle work, or anything of that sort?

A. Not to my recollection; we usually removed those obstructions—we have removed wharves and we have removed wing dams, but I expect that the Government could require—I know that is so, the Government has authority to order any party that has put an obstruction in the river to remove it.

Q. Don't you remember since the Appropriation Act of March 1890 that that provision has been in the law, that the Government could require and the engineers' office could enlist the aid of the United States Attorney to commence a suit to compel the removal of such obstructions in the river?

A. Yes.

Q. Captain, now getting to the specific removal of these particular piles. You were in command of the boat at that time? A. Yes.

(Testimony of H. L. Demeritt.)

Q. You, of course, made no personal examination of what had been underneath the water after it was done in removing the piles?

A. I did not go down, no.

Q. You only know what was reported to you by your divers?

A. Well, what I saw, what I observed; I was there myself.

Q. You saw them go down and put the charge and set the charge off, and the ends of the piles came up?

A. Yes.

Q. In removing a cluster of piles, where there are some 8 or 10 bridge piles, might they not be blown off unevenly?

A. Not above the surface of the bottom.

Q. But I mean one pile with another.

A. That is possible, one pile may be weaker than another.

Q. And one may break one place and one another?

A. But not above where we put the charge. [241]

Q. But below where you put the charge?

A. Oh, yes, sure; one pile may be weaker than the other; you might break one pile off three or four feet below the surface of the bottom and another one off even with the bottom.

Q. You caused no examination to be made to measure exactly at what depth any of those piles had been cut off?

A. No, as long as we got them down to the bottom of the river.

Q. That was your landmark?

(Testimony of H. L. Demeritt.)

A. Yes. Of course, at that time if we got them down to the bottom of the river there was plenty of water for navigation; we were absolutely sure of that.

Q. When you went there with your boat to blow out these piles there were then clusters of piles stick-out *out* of the water, were there not?

A. I do not recollect of any piles sticking out of the water. My recollection was that they were above the bottom, but I don't remember now, it is a long time to recollect a thing like that—I don't recollect any of those piles above the water. They were under the water.

Q. You think all of those were?

A. Yes, it is my recollection that they were all under water. I might be wrong on that. It is pretty hard to remember 24 years back.

Q. Do you remember whether those were bridge piers or piles that had been strung along underneath the bridge to support the false work?

A. No, I think they were bridge piers.

Q. Do you remember of having blown out any piles that might have been used in support of the false work in the middle? A. I could not recollect that.

Q. Do you remember particularly whether you simply blew out the piers where the draw-span was, or did you go clear across the river?

A. No, we did not go across; we cleared the channel.

Q. And the channel at that time was the place where the draw-span was? A. Well, near that.

Q. Near the draw-span? A. Yes.

(Testimony of H. L. Demeritt.)

Q. You did not attempt to go clear across and clean the river out on both sides?

A. No, because that was outside of the [242] channel.

Q. Then, in all probability, there were some piles left over on the Sacramento side that you did not blow out?

A. That might have been; they might have been buried up in sand.

Q. Still there might be some of those piles in water but not in the channel of navigation?

A. That is possible.

Q. Your recollection is that the principal blowing-out that you did was in the then center of the channel?

A. No, to clear the channel, wherever a boat would come.

Q. So that if there was any water on the other side, toward Sacramento and a boat would not go there, you did not go over there and blow them out?

A. If the boat could not go there, no.

Q. Have you been there lately, Captain, since the 1910 bridge was erected?

A. No, not in connection with the river work at all.

Q. Have you observed the channel now?

A. I always observe it when I go there.

Q. The present channel and the present draw-bridge are much nearer, are they not, to the Sacramento side than was the channel and the old draw-bridge?

A. I could not say how it is now. I know the

(Testimony of H. L. Demeritt.)

channel has been much nearer.

Q. In other words, it has shifted from where the old 1878 drawbridge was over toward the Sacramento side? A. Yes.

Q. And when you blew out the piles in 1895 the channel was then more toward the Yolo side than it is now?

A. Well, I don't know how it is just now, at this time of year. The channel changes up there so much; but I have known it to be nearer.

Q. Captain, I invite your attention to a plat here which for convenience is designated as Lieblant's Exhibit 2A, and the line which runs from this pier-head on the Yolo side to near the warehouse on the Sacramento side, which we call the line of the 1878 bridge; I call your attention, down near the bottom of the plat, to a double line across the bottom, which [243] bears "S. P. R. R. and County Highway Bridge built in 1910." A. Yes.

Q. Let us call that the 1910 bridge and the upper line the 1878 bridge. A. All right.

Q. Now, that shows that the present drawbridge, or the draw in the 1910 bridge, is much nearer to the Sacramento side than was the draw-span of the 1878 bridge. A. Yes.

Q. Is it not a fact that when you cleared the channel of the piers in the destruction of the 1878 bridge—

A. (Intg.) That was removed in 1895.

Q. In 1895, yes, that the channel was then down through where this draw-span is indicated on the 1878 bridge?

(Testimony of H. L. Demeritt.)

Mr. FORD.—You mean on the Yolo side?

Mr. HALL.—On the Yolo side.

A. My recollection is they run both spans.

Q. The channel is now over between the draw-span of the 1910 bridge and the Sacramento shore, is it not? A. I would not wonder if it was.

Q. So that this group of piles nearest the Sacramento shore was practically out of the channel in 1895, was it not? A. Well, I guess so.

Q. Did you remove any of this nearest group of piles to the Sacramento shore?

A. That is pretty hard telling, because we removed everything that was in the channel, where a steamboat or barge could get on it. Now, how far it extended over toward the Sacramento side, I could not tell.

Q. But there was some distance of water, was there not, surface water, I mean, on the surface of the stream between where you removed the furthest piles and the Sacramento shore?

A. I think there was.

Q. You think there was?

A. I think there was some distance there of water surface; it might have been, it would not have been deep enough for steamboats, and it would not be where steamboats were running; what we cleaned out was obstructions in [244] the channel as we found the channel at that time.

Q. You did not bother about those piles that were in the water but out of the channel of navigation?

A. No.

(Testimony of H. L. Demeritt.)

Q. I believe you said you did not go there until 1889, was it? A. 1889 is right.

Q. You then found only one bridge across the Sacramento River at that time? A. Yes.

Mr. HALL.—I think that is all.

Redirect Examination.

Mr. FORD.—Q. Captain, referring to this Exhibit 2A, the protection pier shown here is the protection pier for the 1910 bridge; there was formerly a bridge built further down in 1895? A. Yes.

Q. When this one was removed? A. Yes.

Q. I also call your attention to the old Pioneer Mill wharf, over on the Sacramento side, and going out from the Pioneer Mill wharf into the channel, have you any recollection about how far away from that Pioneer Mill wharf you did any blasting at that time?

A. Well, no; that would be stretching my memory too much.

Q. You did blast on the Sacramento side, did you?

A. Yes, that was where we did the principal part of it.

Q. The principal part of it was on the Sacramento side? A. On the Sacramento side.

Q. And you, as you say, were not over blasting the piles along the river bank? A. No.

Q. But you were blasting them out in the channel?

A. Out in the channel.

Q. With reference to the channel as it existed in 1895 and 1896? A. Yes.

Q. Do you recall whether at that time any report

(Testimony of H. L. Demeritt.)

would be made to the office concerning work of that kind, the removal?

A. Well, the reports that we made would give the number of piles that we removed, either by blasting or pulling; I don't remember that we pulled any piles, but we might have; we had a [245] rig to pull piles, but where we found a cluster like that it was much easier and quicker to shoot them off.

Q. You were satisfied, were you, after your crew had worked there, that they had all been shot off down to the river-bed?

A. If I had not made a good job and somebody ran onto them afterwards, I would probably be looking for another job.

Q. By the way, Captain, here I notice on this War Department permit showing the old existing bridge with the draw-span, and there is shown here the new bridge. A. Yes.

Q. With the draw-span.

A. Yes.

Q. And here is shown the Pioneer Mill?

A. Yes.

Q. Now, having this in mind, you say that the work you did was on the Sacramento side, principally?

A. On the Sacramento side, my recollection is.

Q. You will notice the channel was then over on the Sacramento side. A. It had moved over; yes.

Q. It was principally with reference to clearing the then channel that you were then doing this work?

A. Certainly.

(Testimony of H. L. Demeritt.)

Q. By the way, at that time, 1895, was there anybody else up in that neighborhood really equipped to do that work excepting yourself, with your boat?

A. Generally speaking, no, but the Sacramento Transportation Company had at different times done some snagging themselves with one of their boats, but usually further up the river.

Q. What divers did you have? Did you have Kanakas, or men who worked in suits?

A. Kanakas, that went down without armor.

Q. How many divers did you say you had working? A. We usually carried nine.

Recross-examination.

Mr. HALL.—Q. You say that the men who placed the shots on the piles when these piers were blown off in 1895 were Kanakas, who went down without armor?

A. Yes; not always did we place blasts that way, because if we could find a pile with our poles, sometimes we would send the charge down on the poles and not send down the diver, because it was quicker; but [246] if there was anything that required careful placing, we would send a diver down.

Q. In those instances they went down without armor? A. Always.

Q. A man, in diving, can only stay under a short time, can he, when he is going down without armor?

A. A short time is a little indefinite; they would stay down 40 seconds.

Q. A man with armor could stay down, of course, hours? A. Hours, yes.

(Testimony of H. L. Demeritt.)

Q. If there was ten feet of water there it was a fairly good dive, was it not, for a man without armor? A. Ordinary diving, that is all.

Q. An ordinary diver? A. An ordinary dive.

Q. In 40 seconds, that means from the time he went down until he came back up? A. Yes.

Q. That left him probably about how long to work on the bottom?

A. Forty seconds is a long time if you hold a watch on it.

Q. I know, but it would take some time to go down and some time to come up.

A. He probably would go down in five seconds and come back in less than five seconds.

Q. Probably have 35 seconds on the bottom?

A. Something like that.

Q. How much powder did he take down on those trips?

A. Usually I would say five pounds; after the protest of the superintendent of the mill I might have reduced that charge a little, perhaps to three pounds, or two and a half; one and a half pounds will cut a pile off.

Q. That is, a single pile?

A. A single pile, a pound and a half will cut that off.

Q. How much would blow up a whole cluster?

A. Five pounds would blow up probably half a dozen piles in the cluster.

Q. And then you would have to take another dive and another blow to cut the other half?

(Testimony of H. L. Demeritt.)

A. Oh, yes; I fired a good many shots there, a good many.

Q. Are the Kanakas high-grade divers?

A. There aren't any [247] better for that kind of work, that kind of work—you can work so much faster than with a man in armor.

Q. How would you fire the shot in those days, with electricity? A. No, a fuse.

Q. With a time fuse? A. Yes.

Q. About how long would you cut your fuse?

A. Three feet, three and a half feet, along there, three to four feet, and it will burn two feet in a minute and fifteen seconds.

Q. So you would have about a three-minute shot there?

A. No, not so long as that, two and a half minutes.

Q. There was a current in the river down through there at that time, was there not?

A. Some current, not strong.

Redirect Examination.

Mr. FORD.—Q. Now, Captain, I think I probably may have covered this but I want to ask you this: You say you had these poles with which to determine the location of obstructions? A. Yes.

Q. After the piling was blown off, did you have some means of determining whether they had been blown off?

A. We determined that with the poles, and if we had any doubt about it we would send a diver down and let him walk around.

Q. By the way, does the Government still use these Kanaka divers? A. Yes.

Testimony of J. W. Hollenbeck, for Libelant.

J. W. HOLLENBECK, called for the libelant, sworn.

Mr. HALL.—Q. Your name is J. W. Hollenbeck?

A. Yes.

Q. Where do you live? A. San Francisco.

Q. What is your occupation?

A. Dredging. I have been following dredging for the last several years.

Q. About how many years have you been engaged in dredging? A. About 30; probably 30 or 31.

Q. What was your father's occupation?

A. He was a farmer.

Q. Was he ever engaged in the dredging business?

A. No. [248]

Q. Are you familiar with the Sacramento River in and about Sacramento, California?

A. Yes, I have been around there some time.

Q. You know the stream in that vicinity?

A. I have been residing on the Sacramento River.

Q. Have you ever been in charge of what is known as a clamshell dredge? A. Yes, I have.

Q. Do you know the dredger "Thor"? A. Yes.

Q. Have you ever been aboard of her? A. Yes.

Q. Ever work aboard of her?

A. No, I never did.

Q. Have you ever navigated clamshell dredgers such as the "Thor" up and down the Sacramento River? A. Yes.

Q. Will you please tell the Court, in going from a point about a mile above the present railroad bridge

(Testimony of J. W. Hollenbeck.)

across the Sacramento River down to the intake of the Water Works of the City of Sacramento below the bridge, the proper manner to navigate such a craft?

A. Sometimes we have them towed through, and then again, when the current is strong, we prefer going through under our own power, that is, let her go with the current, provided we are going down stream, this is.

Q. Yes.

A. We let them drift along with the current, and in case they get near one side of the bridge or the other we drop a spud and center them and pick up our spud and let them drift again; sometimes this is necessary on account of the wind that will take us to one side or the other.

Q. In going down the stream with a clamshell dredger such as the "Thor," which end do you permit to be in front and which in the rear?

A. We go down with what we would stern first, that is, the boom would be upstream going down.

Q. How do you navigate her at that time in going down stream with the boom upstream?

A. We would let her drift and then check her up with the bucket; sometimes, when the current is strong, we will drop the bucket and let the wire pay off, let the dredge drift on down, and if she is to one side or the other we will drop the spud and work it to the center and then [249] let her drift again.

Q. Is that the ordinary and usual way?

A. That is the way I have brought them through.

(Testimony of J. W. Hollenbeck.)

Of course, as I say, sometimes we have everything favorable and we will go through with a tow.

Q. In going through with a tow, what do you call being favorable?

A. A case where there is no wind and plenty of water, and not too strong a current; going through with a tow, with unfavorable conditions, such as wind blowing, it may take you to one side and a boat like that coming in contact with the approaches of the bridge or draw, it will do a good deal of damage, going at any rate of speed. Some towboat men refuse to take us through. I have had towboat men that positively let go when we came to the bridge, and compel the dredge to float through; they do not want to take the responsibility of doing any damage.

Q. Do you mean to say by that it is dangerous sometimes to take a dredge through with a tow?

A. Yes, that is, downstream; upstream it is all right, a boat can slow down and you can work her through.

Q. Are you familiar with the stream outside this drawbridge and upstream for a distance of a mile?

A. I have not been through that bridge for the last year—three or four years—but I have been through before that at different times, both up and down.

Q. Have you been through there without a tow?

A. Yes.

Q. Both ways without a tow?

A. No; you could not go up without a tow.

Q. I mean downstream with a tow and upstream with a tow? A. Yes.

(Testimony of J. W. Hollenbeck.)

Q. Have you ever seen other dredgers being taken downstream through there without a tow, from time to time?

A. I don't know as I have ever been there when a dredge is going through; I could not say I ever saw a dredge going through there, except my own. [250]

Q. Now, Captain, leaving out of the question entirely this drawbridge and supposing that there was no bridge there in the river, would it be safe and good navigation, or poor navigation and unsafe, to drop a dredge such as the "Thor" downstream?

A. If a person only had a short way to go that would be the most practicable way to go down, to let her drift down.

Q. To let the dredge drift down?

A. Sure, for a short distance.

Q. How long have you known the river there in front of Sacramento?

A. Well, I have been up to Sacramento, of course, when I was a boy, off and on, until the present time, probably once or twice a year. When I got into the dredging business we did work there for the Government, digging through that bridge, and I have worked for the Southern Pacific just above the bridge; I have been through there many times.

Q. Have you ever navigated a steam vessel?

A. No, I never have.

Q. You have not a license?

A. No, I have not.

Q. Have you observed steam craft going up and down the river there? A. Oh, yes.

(Testimony of J. W. Hollenbeck.)

Q. Have you observed, in your experience, the different ways of navigating craft up and down there? A. Yes.

Q. Is there any comparison between the way you navigate a craft, a vessel under a steam and with a propeller and rudder, and the way you navigate a clamshell dredger?

A. Well, when you are in tow, you use the same idea as a barge pilot would use to steer with, a bucket, as they would steer with their rudders, and when not in tow going down with the current, we practically drop ourselves down by paying off on the bucket, if there is a strong current, or by paying off on the cable, and when you get to the end we would pick the bucket up and drop it and let it go again and stop the boat, where there is danger of hitting a bridge or a vessel that might come in contact with it.

Q. Do you consider that a perfectly safe way?

A. Well, we can [251] check ourselves just the same as a ship would by putting out her anchor, with our bucket; that is one of the safest ways there is where there is danger.

Q. You can handle a clamshell dredger very easily that way? A. Yes.

Q. And very safely?

A. Yes. You always have it under control and you can drop the spud—of course, if you let them go down at random and drop the spud you are apt to break the spud.

Q. But with the use of the spud and bucket that

(Testimony of J. W. Hollenbeck.)

is a safe way to navigate one of these vessels downstream?

A. One of the safest ways that I know of.

Cross-examination.

Mr. FORD.—Q. What is a spud?

A. A spud is what we use as an anchor to hold our dredge in position, a large timber that goes through a tube extending through the hull of the boat. The spud anchors the dredger to the bottom of the river.

Q. Captain, as I understand you, in dropping your dredger donwstream, which you say you do for a short distance without a tow, you really anchor the boat and let it drop down, still holding on to whatever your anchor is, do you not?

A. Yes, your bucket.

Q. You can go very slowly, can you?

A. Yes, by paying off and letting her go down.

Q. What means have you, where you are drifting down in shallow water, to determine whether you are going to strike any obstruction, have you any pole or anything to feel with?

A. No; as a steamboatman, we judge we know pretty near where the channel is; we have some idea.

Q. Do you aim to keep in the channel?

A. Yes.

Q. In passing the bridge, the present drawbridge there at Sacramento, from a mile above it, would you keep out in the channel, or over near the Sacramento bank?

(Testimony of J. W. Hollenbeck.)

A. We would keep about the channel; by keeping in the channel you generally are furthest from danger one way or the other. [252]

Q. Furthest from danger one way or the other?

A. Yes. If you go hugging along the shore sometimes there is piling; you might be over close to the approach of the bridge or to the draw if you got out of the channel.

Q. You were not up there during 1918, or 1919, when they had extremely low water? A. No.

Q. You understand, do you not, that the water in 1918 went down to only about a foot above zero?

A. Yes, I hear that.

Q. Where back in former years, it had been up around, say, 7 or 8 feet above zero? A. Yes.

Q. In dropping down or drifting your barge down from a mile above the bridge at Sacramento during 1918, with such extremely low water, there would be more reason for staying out in the channel, would there not? A. Yes.

Q. Because if you got over in near the bank on either side you might strike obstructions which were hitherto unknown? A. Yes.

Q. About what do the boats running from the Sacramento front up draw, do you know—or do you know anything about that?

A. No, I do not. Those barges that belong to the Sacramento Transportation Company, I suppose they would draw in the neighborhood of four or five of water coming down.

Q. That is, loaded?

(Testimony of J. W. Hollenbeck.)

A. Yes, that is loaded.

Q. Do you know what this "Thor" would draw or were you acquainted with her?

A. Well, the "Thor," I should imagine, would draw between five and six feet; that would be governed a good deal by the amount of oil she had in.

Q. Were you acquainted with the "Thor" from the time of her building? A. Yes.

Q. You built her?

A. No, I did not built her.

Q. But you are acquainted with her? A. Yes.

Q. And in drifting, or in dropping down the river with the boom upstream, which end of the "Thor" would be the lower in the water?

A. The bow would be lowest, drawing the most water. [253]

Q. About how much would that end of the boat be drawing?

A. When she would be on an even keel, I should think she would draw about five feet; now, this is imagining that she is about half full of oil; and the stern would be drawing about between three and four.

Q. About the center line of the boat would be drawing about how much?

A. Well, say in the neighborhood of 4½ feet; when this boom is changed from one side to the other, that will make her draw probably two or three feet more; she will careen over.

Q. Turn some?

(Testimony of J. W. Hollenbeck.)

A. Yes.

Q. And in dropping down the river the way you say it would be dropped, by dropping the bucket and letting out the line? A. Yes.

Q. Would the boat go down practically along an even keel in the stream, or would it go careening, or how?

A. That would depend on the wind; the wind will take you off one side or the other, but to counterbalance that, with such a dredger as the "Thor," you would hold on to one cable or the other, which would turn the boat.

Q. Well, in dropping down—I will just make a rough diagram here; say here is the draw of the bridge, between the place where I have marked the two lines and a single line out here, and here is the center of the stream; might she drop down at such an angle as shown here?

A. Yes, provided the wind was coming this way, but in that case we would swing her boom off this way and hold onto this shore with our bucket and cable and the current in that way would swing her in a line—we would grapple in here with the bucket and just hold her there a while, and the current would then swing her, and when she swung under there let go and let her drop down.

Q. With that bucket, you would be able to keep your boat how near to the line that you wanted to travel?

A. You see, we have a chain to slacken off and pull on—each one runs to the side of the boat, and

(Testimony of J. W. Hollenbeck.)

we could pull on one chain or slacken [254] off on one or both of them.

Q. In dropping your boat down the river and using the bucket as an anchor, or whatever you call it, and letting your line out, how near would you be able to keep to the channel, that is, one way or the other?

A. By using care, you could keep almost where you wanted?

Q. Within how many feet, say, of the line that you would keep at going down the channel?

A. You could strike it within a very few feet, 20 or 30 feet of a center; but when you get too far off, drop your spud and shift your bucket to the opposite side, and then you can drop your after spud and pull on one cable and swing her right back where you want her.

Q. Have you any recollection about how wide the draw is there at the bridge on the Sacramento side? I suppose it is the same on both sides?

A. It is the same.

Q. Do you know about what it is?

A. No, I could not say what that draw is; I should think it was about 175 feet; there is plenty of room to get a dredger through there by using a little care.

Q. This dredger, the evidence shows, is 58 feet across, so that would leave considerable room, would it?

A. Yes, it would leave plenty of room.

Q. Captain, in drifting down the river there dur-

(Testimony of J. W. Hollenbeck.)

ing the extremely low water that I have indicated, just about a foot above the zero mark, and in exercising the care that you have indicated that should be exercised in a case of that kind, would there be any way in which, in dropping your boat down there, that you could be advised that you were going to strike an obstruction? A. Oh, yes.

Q. What is that?

A. A man always looks back, he has the pilot-house door open, and windows, to keep looking back, that is, downstream, and governs his boat accordingly.

Q. Well, don't you, in dropping your boat down, have poles, or something, to feel for obstructions?

A. No, I never had.

Q. How fast do you drop down?

A. Well, you would not go [255] very fast through there; you would go at the rate of half a mile an hour; going through that short distance you would be making pretty good time, dropping through there; if there is no wind, so you do not have to drop your bucket, you would go pretty near as fast as the current would take you, which would probably be a mile, or something like that; if the wind was blowing so it would take you to one side or the other, you would have to be continually dropping your spud and straightening her up and keep her in the center, and let her go again. All that takes time.

Q. The evidence in this case shows that when the "Thor" became stuck on the piles there that the

(Testimony of J. W. Hollenbeck.)

end of the boat toward the Sacramento side and toward the bridge was resting on sand and it caused the boat to list so that the side toward the Yolo side and toward the upstream end was submerged, but the Sacramento side was standing out of the water.

Mr. HALL.—I do not think that is correct.

Mr. FORD.—Yes, it is.

Mr. HALL.—I must object to the question, because it is based on a state of facts not borne out by the record.

Mr. FORD.—It shows that in that condition that the Yolo side of the "Thor" listed over, and the water filling it up, that the upstream end toward the Yolo side rested on a bunch of piles there, which, from the description of the boat, was about ten feet, probably, below the water, maybe not quite so deep. As I understand you, with the "Thor" drifting downstream, no part of the boat would be drawing more than between five and six feet?

A. I would not think so, unless, as I say, she was careened over; then it would be a matter of just how far to right angles the boom was.

Q. About how far, in careening over, might she tip?

A. She would go down about two feet more, probably; a boat like that may careen so that one side would be four feet higher than the other; that would be two feet by the center; that [256] would be with a lot of mud or whatever they might swing in the bucket; so, in that case, she would draw maybe seven or eight feet of water, at that very

(Testimony of J. W. Hollenbeck.)

lowest point when the boom was swinging to right angles with a lot of mud.

Q. Were you engaged in the dredging business along about this time, about 1918? A. Yes.

Q. What was the reasonable rental value, per day, of a dredge during that summer? A. In 1918?

Q. That is, a dredge such as the "Thor," yes.

A. About $175 a day for 22 hours.

Q. What had been the rental value per day, say years previous to that; had there been any change?

A. Yes, say along in 1912 and 1913, such a boat would rent for $140 a day, 22 hours.

Q. That is the difference between 1912 and 1913 and 1918 is the difference between $140 and $175?

A. Yes.

Q. And those rentals include the cost of operating the boat, do they?

A. Yes, that was net to the man or the company that they worked for.

Q. About what would be the depreciation average per month on such a dredge, if that is the way to get at it, whether overhead or keeping it up?

A. That is deterioration of the boat and the machinery?

Q. Yes.

A. Well, a man could almost figure on 8 to 10 per cent on hull and machinery.

Q. Eight to ten per cent?

A. Say 8 per cent.

Q. A month? A. A year.

Q. Only a depreciation of 8 per cent a year?

(Testimony of J. W. Hollenbeck.)

A. Eight or ten per cent a year; that is, a dredge 10 years old would cost almost as much to put her back to what her first cost would be.

Q. How often would such a dredger have to go into drydock for repairs, on the average?

A. I have been dredging a good many years, and never drydocked one, but that depends a good deal on the nature of the work they are doing, the size of the bucket, the age of the boat, as when it gets older it has to [257] go oftener, but a new boat ought to run eight or ten years without drydocking, unless something unforeseen comes along and snags her or damages her.

Q. What would you say would be the average monthly or yearly expense, whichever way you get at it, of the upkeep of a boat of that character?

A. That is, taking an average of ten years time, as I say, it would about 10 per cent, one-tenth of the cost per year. In ten years' time you would have to practically, to put that boat back again in the same shape as she was when she came out, have to spend pretty near her cost.

Q. During the time you are spending a lot of money every month, keeping the boat up?

A. Yes, but it won't be every month; you may run a year and hardly spend anything, and then go ot the drydock and spend several thousand on her.

Q. By the way, was the "Thor" an old or new boat?

A. She is not a very old boat; I should think about fourteen years old, 14 or 15; I would not say

(Testimony of J. W. Hollenbeck.)

that to be correct, but as near as I can remember I think she was built along about 14 years ago.

Q. You don't know whether it has been in the drydock or was repaired shortly before that, do you?

A. I think she has been in drydock, yes, she has been fixed up, rebuilt.

Mr. FORD.—That is all.

Redirect Examination.

Mr. HALL.—You are not personally acquainted with the "Thor," that is, you don't know anything about her construction or her deterioration. You just have given a general average?

A. Just general average, yes. I have not been aboard the "Thor," only I should say offhand, two or three times during the life of the boat.

Q. Captain, you knew nothing about the sand bar that the "Thor" struck on there in the river?

A. No, I do not. [258]

Q. When you answered Mr. Ford's question, you were answering on the assumption that what he stated was the exact conditions? A. Yes.

(An adjournment was here taken until Tuesday, December 16, 1919, at 1:30 o'clock P. M.)

Tuesday, December 16, 1919.

Testimony of J. C. Boyd, for Libelant (Recalled).

J. C. BOYD, recalled for the libelant.

Mr. HALL.—Q. Mr. Boyd, since you were on the stand the other day, have you visited the river

(Testimony of J. C. Boyd.)

where the "Thor" was sunk? A. I have.

Q. Did you go in company with Mr. McCurry?

A. I did.

Q. Mr. McCurry, I believe, was the photographer who took the pictures that have been offered as Libelant's Exhibit No. 8? A. Yes.

Q. Did Mr. McCurry point out to you the various places where the different pictures, A, B, C, D, E, F, G, H, I, J, K, were taken? A. He did.

Q. Have you prepared a plat showing the points from which those pictures were taken, and the center of the view depicted in the different pictures?

A. I have.

Q. You have that before you?

A. I have that plat here.

Q. Will you briefly explain to the Court that plat?

A. In the making of the plat, which I will describe as Libelant's Exhibit 19, I made measurement by chain survey to determine the point at which Mr. McCurry had his camera when he took the photograph designated on the lower left-hand corner of the photograph as E; the point from which E was taken is located 204 feet northerly from the southwest corner of the Wood-Curtiss Company warehouse on the Sacramento shore, and northerly from the Southern Pacific bridge. The point at which the camera was located in taking the view designated in the lower left-hand corner of the photograph as F is 344 feet northerly from [259] the same corner of that warehouse. The position

(Testimony of J. C. Boyd.)

of the various other points at which the camera was located is designated on this map, known as Libelant's Exhibit 19, under the letters A to I, inclusive. The point I is at the northeast corner of the Southern Pacific bridge, and the direction of the view was through the protection cluster of piles which is in the river about 45 feet from the bridge. The square shown in yellow is the position of the "Thor," as it is shown and mapped on the U. S. Government map Exhibit 10. The boom is added to that, 129 feet 10 inches in horizontal length. At the end of that boom the bucket was suspended, and the bucket and boom are shown in several photographs mentioned; the little character that is shown just below the letter K is a reproduction of a feature of the photograph D, showing a man in a rowboat alongside of a sandbar; the radial lines shown in dotted red lines are axes of the lines of sight on which the photographs were taken.

Q. Now, the points A, B, C, D, E, F, G, H, I, J and K are the points from whence the respective photographs A, B, C, D, E, F, G, H, I, J, and K were taken? A. They are.

Q. And those lines and positions were determined by you from your being shown them by Mr. McCurry, were they not?

A. The point in midstream was not now accessible except by boat; the sandbar is not in evidence; the exact position is only determined by the relative locations of the various other features which

(Testimony of J. C. Boyd.)

show in the photograph, for instance, the warehouse, on one side, the end of the bridge, the end of the horizontal core of the bridge, the center of the bridge, and the position of the protection work and the various parts of the protection work, which, altogether, go to make up the various photographs.

Q. Would you say that this place, then, that you have marked as "Sandbar from which photographs A, B, J, K, D, were taken" was reasonably accurately depicted on your plat? A. Yes.

Q. With reference to the position of the "Thor" and the [260] position of the protection wing of the present drawbridge? A. Yes.

Q. And the present drawbridge, itself, there, and the "Thor" is sketched on here, as I understand it, from the Government notes which we have depicted on Exhibit 10? A. That is true.

Q. And the warehouse you have here is in a little different position, is it not, from what it is on Libelant's Exhibit 2A and Exhibit 10, which was the Government map?

A. That location is put on this map from a survey made by me on December 15, 1919.

Q. Your starting point to make that survey was at a point on the present 1910 bridge?

A. 1910 bridge, yes.

Q. So that from the data you have you then want to tell the Court that the present 1910 bridge, the location of the "Thor," the location of the warehouse are exactly correct, according to your survey? A. Yes.

(Testimony of J. C. Boyd.)

Q. And that the sandbar is comparatively correct, as near as you could make it from the situation?

A. As near as I could sketch it, in from the photographs. On one of the photographs I have made some notations, that is, a duplicate photograph of the one already in evidence.

Q. That is photograph G that you refer to?

A. On photograph G I have made some notations in ink showing where the various points of observation were at which the camera was placed when the photo was taken.

Q. Have you testified about the sources of that data from which the photographs were taken?

A. As an instance, I say on this picture designated as G, "Photo H from here," indicating that the photograph known as "H" was taken from that point.

Mr. HALL.—Now, we offer in evidence as illustrative of the witness' testimony the plat which he has identified and marked Libelant's Exhibit 19, and we also desire to offer as Libelant's Exhibit 20 another copy of the photograph G which has the marking on it, and also the photograph I, which has the indication of the sandbar marked on it, as Libelant's Exhibit 21. [261]

Mr. FORD.—No objection. No cross-examination.

Testimony of H. J. McCurry, for Libelant.

H. J. McCURRY, called for the libelant, sworn.

Mr. HALL.—Q. Your name is H. J. McCurry?

A. Yes.

Q. You are in the photograph business at Sacramento? A. Yes.

Mr. FORD.—We will admit his qualifications, because he has pretty good photographs.

Mr. HALL.—Q. You took the photographs which have been marked together in a bunch as Libelant's Exhibit 8, which are lettered on the face of them from A to K, inclusive? A. Yes.

Q. When did you take those?

A. They were taken on the 30th of July, at 6. o'clock, 1918.

Q. Were you present the last few days at the scene of the sinking of the "Thor" on the Sacramento River with Mr. Boyd?

A. I was present yesterday evening at four o'clock with Mr. Boyd.

Q. You heard Mr. Boyd's testimony here?

A. Yes.

Q. Did you point out to him these various places that he has marked on the map from which these various pictures were taken?

A. Yes. I might state, to make it clear, I took the camera down and set it up at identically the same spot and focused it with the same pictures to show that they were taken from those places, and they focused within a thirty-second of an inch.

(Testimony of H. J. McCurry.)

Q. That is, with the exception of the photograph on the sandbar? A. Yes.

Q. The sandbar is not there now?

A. No. A calculation from the pictures we took brought it out exactly.

Q. From your experience as a photographer, and your work there yesterday, would you or would you not say that Mr. Boyd has depicted on this Exhibit 19 a fairly accurate position of the camera and of the sandbar that existed at the time [262] you took the photographs? A. Yes.

Q. Do the photographs correctly delineate the actual conditions as they existed at the time you took the photographs? A. Absolutely correct.

Cross-examination.

Mr. FORD.—You took no photographs prior to July 30th? A. No.

Q. You know nothing about the location of the boat before that date, that is in the water, or with reference to any other objects there. All you know is what you found there?

A. I am not familiar with it at all, any more than I was told to go down and cover it, that is all.

Q. If the boat had been submerged prior to that date it was not on that day?

A. No. It was just as the pictures show it there.

Mr. HALL.—May the record show that we read in evidence into the record the lease from the Northern California Railway to the Southern Pacific Railroad Company, dated July 1, 1888, and found in this report of the Railroad Commission case, motion for injunc-

tion *pendente lite,* bill in equity, bill of intervention, and affidavits, and found particularly on pages 33 et seq. of the brief in the United States Circuit Court for the Northern District of California, No. 12,127, Southern Pacific Company, Complainant, vs. The Board of Railroad Commissioners of the State of California, et al., Defendants, and affidavit No. 3 of James I. Stanton, found on pages 33 to 37, inclusive, and also the agreement of June 1, 1889, between Northern California Railway Company and Southern Pacific, being found on pages 38, 39, 40 and 41 of the same brief, or portion of the brief that I have just described.

Mr. FORD.—Yes.

(The documents are as follows:) [263]

Exhibit "G."

"LEASE NORTHERN RAILWAY COMPANY TO SOUTHERN PACIFIC COMPANY.

"This indenture, made and entered into this first day of July, A. D. 1888, by and between the Northern Railway Company, a corporation existing under the laws of the State of California, party of the first part, and the Southern Pacific Company, a corporation existing under the laws of the State of Kentucky, party of the second part,

"WITNESSETH:

"First—The party of the first part hereby leases to the party of the second part for the period of 99 years from the date hereof, all of its railroad, the telegraph lines constructed or hereafter to be constructed in the State of California; and also all

depots and station houses; equipments and appurtenances of every kind and nature whatsoever, to the said railroad and telegraph lines respectively belonging or appertaining; together with all ferries, tugs, wharves, docks, and other property which may be used in connection therewith; and all the corporate rights, privileges, and franchises of said party of the first part pertaining to said railroad and telegraph lines.

"Second—The party of the second part is to operate the said railroad and telegraph lines, and out of the earnings and income derived therefrom pay the expenses of operation, repairs, maintenance, and damages to persons or property incurred in the course of operation, all taxes which may be levied upon or assessed against said leased property, also all general, legal, and corporate expenses of said Northern Railway Company; and after the payments and deductions aforesaid, the said lessee shall apply the residue of the amount of the net income from said leased property, to such extent as shall be required for the purpose, to the payment of the current interest, from time to time becoming due and payable during the existence of this lease, on the floating debt and on the bonded debt of said Northern Railway Company now existing, or [264] which may hereafter be created by consent of said lessee.

"Third—The betterments and additions to said leased property shall be made by the said lessee, but shall be a charge to the said lessor, and the settlement therefor shall be made annually, at the same

time settlement is made for the net income or rental as provided herein.

"Fourth—On the first day of May, in each year during the continuance of this lease, the party of the second part shall pay to the party of the first part, such balance, if any, of the net income received by the party of the second part, from the said leased property for the year ending on the 31st day of December then next preceding, as shall remain in its hands after all the payments required in the second paragraph above have been made or provided for.

"Provided, however, that if at any time, viz.: such first day of May, when such balance of income or rental is provided to be paid to the party of the first part, there shall be any sum due or owing from the party of the first part to the party of the second part for or in respect to advances or payments theretofore made by the party of the second part for new addition or betterments to said leased property, or for general, legal, or corporation expenses of said Northern Railway Company, or for interest on the floating or the bonded debt of the said Northern Railway Company, or for any expenses of its business or affairs, other than such as are for or on account of the operation, repairs, maintenance, and taxes of said leased property, before provided to be paid by the lessee out of the earnings or income, or for or in respect of any other sums which may have been lawfully advanced or paid by the lessee to or for the party of the first part: the party of the second part shall be entitled to retain and pay to itself whatever may be owing to it from the party of the

first part for or in respect of any of the causes or matters or considerations aforesaid, including any interest which may be due or owing from the party of the first part to the party of the [265] second part thereon.

"And provided further, that if such net income received by the party of the second part from the said leased property for any year, which by the foregoing provisions hereof would be and become payable by said party of the second part to said party of the first part, shall exceed the amount of six per cent per annum upon the par value of the then existing capital stock of the party of the first part, then and in that event the said party of the second part shall be entitled to and shall retain to itself for its own use any and all excess of such balance of net income over and above the amount of six per cent per annum upon the par value of the then existing capital stock of the party of the first part.

"Fifth—In case the amount of net earnings or income of the said leased property applicable under the preceding provisions hereof to the payment of the current interest upon the bonded indebtedness of the party of the first part, shall be insufficient in any year to pay in full such current interest for the year, together with the general, legal and corporate expenses of said Northern Railway Company, it shall be optional with the said party of the second part whether or not to advance or pay for account of the party of the first part the amount of such deficiency; and if the party of the second part shall advance or

pay for account of the party of the first part such deficiency, or any part thereof, it shall be entitled to interest at the rate of six per cent per annum upon such advances or payments until reimbursed therefor, and shall be entitled to repay itself for such advances or payments and interest at any time, or from time to time, out of any subsequent earnings or income of said railroads in the manner provided by the fourth article hereof in that behalf, and shall have a lien therefor upon the demised premises and the income thereof until such advance or payments with interest thereon shall be reimbursed; and in case the party of the sceond part shall at any time, or from time to time, make any advances to or for the party of the first part for any [266] other object or purpose, the party of the second part shall be entitled to receive interest on all such advances at the rate of six per cent per annum from the making until the reimbursement thereof, and the party of the second part shall have a lien for such advances and the interest thereon upon the said demised premises and the income thereof until such advances are reimbursed with interest; and the party of the second part shall be entitled at any time, and from time to time, to refund itself such advances and interest out of any earnings or income of the said leased property which may be in its hand, unless it shall have been expressly agreed between the parties hereto to the contrary in writing at or before the making of such advances.

"Sixth—The existing leases of the formerly exist-

ing Northern Railway Company, Amador Branch Railroad Company, and Berkeley Branch Railroad Company, are hereby canceled and annulled.

"Seventh—In further consideration of the terms and conditions of this lease to be kept and performed by the said Northern Railway Company, the said Southern Pacific Company hereby agrees that it will, upon demand of said Northern Railway Company, in such form as may be required, guarantee the payment of both principal and interest of those certain thirty-year, six per cent first mortgage bonds, issued under a certain indenture of mortgage by the Northern Railway Company to Eugene Kelly and Henry B. Laidlaw, as trustees, dated the fourteenth day of April, 1877, which bond bears date the first day of January, 1877, with interest thereon payable semi-annually on the first day of January and July of each year, and are numbered from 3,965 to 4,464, both inclusive, being for $1,000 each, and amounting to $500,000; also such additional bonds as may be issued under said mortgage by said Northern Railway Company, in payment for the construction of its second track of railroad between West Oakland and Port Costa (not exceeding, however, the amount of $25,000 in such bonds per mile of road), and [267] aggregating 27 miles, more or less.

"In witness whereof, the parties hereto have hereunto affixed their corporate seals, and caused these presents to be signed by their Presidents and Sec-

retaries, pursuant to orders of their respective Boards of Directors.

"NORTHERN RAILWAY COMPANY,
"(Seal) By CHAS. F. CROCKER,
"President.
"And W. V. HUNTINGTON,
"Secretary.
"SOUTHERN PACIFIC COMPANY,
"By CHAS. F. CROCKER,
"Third Vice-President.
"And G. L. LANSING,
"Secretary.

[Endorsed]: Lease, Northern Railway Company to Southern Pacific Company, July 1st, 1888."

(Exhibit H:)

Exhibit "H."

"This agreement, made this first day of June, A. D. 1889, between the Northern California Railway Company, a railroad corporation duly organized and existing under the laws of the State of California, party of the first part, and the Southern Pacific Company, a corporation organized under a law of the State of Kentucky, and now doing business as a railroad corporation in the State of California, party of the second part,

"WITNESSETH:

"That the party of the first part hath granted, demised, and letten, and by these presents doth grant, demise, and let unto the party of the second part, its successors and assigns, for the term of forty (40) years, from the first day of June, A. D. 1889, all of

its railroad and telegraph line situate within the State of California, and described as follows, to wit:

"Commencing at Oroville, in the County of Butte, and running thence to Knight's Landing, in the County of Yolo, [268] a distance of fifty-five miles, more or less; a portion of which railroad is now completed, and a portion of which is yet to be completed by the party of the first part.

"And also, all wharves and bridges, superstructures, depot grounds, work-shops, tools, machinery, rolling stock, and all real and personal property of every kind belonging to the party of the first part, and used in connection with said railroad and telegraph line, together with all the corporate rights, privileges, and franchises of said party of the first part pertaining to said railroad or telegraph lines, and all and singular the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, with the right to possess, maintain, use, and enjoy the said property, and to receive the freights, fares, tolls, rents, issues, and profits thereof; and the party of the first part hereby covenants to and with the party of the second part, that it will, within a reasonable time, finish, complete, and properly equip the whole of said railroad and telegraph line, and in particular that portion thereof extending from Marysville, in the County of Yuba, to Knight's Landing, aforesaid, together with the appurtenances, so that the party of the second part may have and enjoy the same fully completed and equipped.

"And this agreement further witnesseth, That the party of the second part, in consideration of the

premises, covenants and agrees to and with said party of the first part, its successors and assigns, as follows, to wit:

"First—That it will pay said party of the first part, as rental, the sum of one dollar per annum, in legal coin of the United States, for each and every year henceforth during said term of forty (40) years.

"Second—That it will during said term pay all expenses incurred in the operation and management of said property, and all losses and damages sustained by strangers through the negligent operation and management of the same, and will pay all taxes legally assessed against or levied upon it. [269]

"Third—That it will keep and maintain said property in good repair, add to and better the same during said term, and at the expiration thereof return the same in as good condition as the same now is, except such extraordinary damages as may result from freshets, floods, or other acts of Providence, the public enemy, or strangers, which are to be repaired by said party of the first part at its own cost and expense.

"Fourth—That it will guarantee the payment, principal and interest, of eleven hundred bonds for one thousand dollars each, numbered from one to eleven hundred inclusive, of the said party of the first part, bearing date the first day of November, 1889, and payable to the California Safe Deposit & Trust Company, a corporation organized and existing under the laws of the State of California, or to the bearer thereof, on the first day of June, 1929, with interest at the rate of five per cent per annum

from the first day of June, 1889, payable semi-annually on the first days of June and December of each year ensuing its date, both principal and interest payable in gold coin of the United States of the present standard and fineness, in the City of San Francisco, State of California, or in the City of New York, State of New York; the said bonds being the same mentioned and described in that certain mortgage deed bearing date the first day of November, A. D. 1889, and made and executed by the party of the first part hereto to the California Safe Deposit & Trust Company aforesaid.

"Fifth—That it hereby assumes and agrees to pay off and discharge the interest aforesaid, as the same may become due and payable; and it hereby agrees to pay the sum of ten thousand dollars in the year 1899, and each year thereafter during the term of this lease, into the sinking fund created by the party of the first part for the redemption and payment of the bonds aforesaid, as provided for in the mortgage deed hereinbefore mentioned. [270]

"And this agreement further witnesseth, That in consideration of the premises, and for and in consideration of the sum of one dollar by the party of the second part to the party of the first part in hand paid, the receipt whereof is hereby acknowledged, the said party of the first part further covenants to and with the said party of the second part that it will now and forever indemnify and save harmless the said party of the second part from and against every liability (excepting the liability to pay interest), arising out of the Act of Guaranty, aforesaid;

and in order to fully secure said party of the second part from loss and damage on account thereof, it will not hereafter, without the consent, in writing, of the said party of the second part, in any manner further encumber, or permit its real or personal property to be encumbered, or become subject to any lien or liens whatever.

"And this agreement further witnesseth, That the party of the first part at all times during said term shall have the right to enter upon said demised premises for the purpose of repairing any damages it may have sustained by reason of freshets, floods, or other act of Providence, the public enemy or strangers, as aforesaid.

"This agreement further witnesseth, That the terms of this lease shall be subject to alteration or revision at the expiration of each period of five years, upon the demand of either of the parties hereto. The party making the demand must specify, in writing, the alteration or revision which it desires to have made, and shall submit the same to the other party. If the said parties cannot, within a reasonable time thereafter, agree upon such alteration or revision, the subject-matter shall be referred to three arbitrators, one to be chosen by each party, and the third by the two so chosen. The decision of a majority of the arbitrators shall be conclusive upon the parties hereto.

"In testimony whereof, the parties hereto, pursuant to the order of their respective Boards of Directors heretofore duly [271] made, have caused

these presents to be signed by their respective Presidents and Secretaries.

"N. D. RIDEOUT,

"President of the Northern California Railway Company.

"(Corporate Seal) ANDREW J. BINNY,

"Secretary of the Northern California Railway Company.

"CHARLES F. CROCKER,

"President of the Southern Pacific Company.

"(Corporate Seal) G. L. LANSING,

"Secretary of the Southern Pacific Company.

"[Endorsed]: Agreement of Lease. Northern California Railway Company to Southern Pacific Company. For Forty Years from June 30, 1889."

[Endorsed]: Filed Jan. 28, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [272]

Friday, December 19, 1919.

Mr. HALL.—Libelant offers in evidence the log sheets of the Olympian dredge "Thor" from Saturday, July 13, 1918, to August 17, 1918, inclusive. The first one here is an original log sheet of July 13, 1918; the rest of them are copies.

Mr. FORD.—There will be no objection on account of their being copies, but they are objected to—hearsay, immaterial and irrelevant.

(The log sheets are marked Libelant's Exhibit 22.)

Mr. FORD.—We offer in evidence the record maintained by the bridge-tender concerning the passage of boats up and down the river. No objec-

tion on account of the original not being produced here, Mr. Hall?

Mr. HALL.—No.

Testimony of Wm. E. Palmer, for Respondents.

WM. E. PALMER, called for respondents, sworn.

Mr. FORD.—Q. What is your business or occupation?

A. I am president of the Olympian Dredge Company.

Q. You are acquainted with the "Thor," are you?

A. Yes.

Q. When was it built? A. In 1906.

Q. By whom?

A. By the Golden State Miners Iron Works.

Q. Where? A. At West Alameda.

Q. Was it in drydock at any time prior to the date of this accident? A. Yes.

Q. As near as I can recollect some three or four years before the accident.

Q. At what drydock?

A. At the same drydock that she was taken to be repaired at this time.

Q. What did the boat cost to build?

A. About $65,000 or $70,000.

Q. Were you acquainted with the damage done to the boat following July 13, 1918?

A. Yes, I saw her on the dock after she had been brought down.

Q. And before her repair? A. Yes.

Q. What damage did you observe?

(Testimony of Wm. E. Palmer.)

A. Well, there were numerous [273] holes through the botom, made by various piles; the largest was about in the middle, under the forward hatch.

Q. Any other damage besides the holes in the bottom? A. Yes, on the forward rake.

Q. That is part of the bottom of the boat, is it not?

A. Yes, it is; you might call it the stem.

Q. Was there any other hole on either side?

A. Yes.

Q. Where?

A. Some of them were pretty well forward and the others were pretty well aft.

Q. Were those on the bottom of the boat, or side of the boat? A. Bottom of the boat.

Q. How near was the nearest hole over to the extreme side of the boat?

A. I should say within five feet.

Q. What damage, other than the holes through the bottom of the boat, did you observe?

A. Well, it seemed like when she sank on an uneven bottom that the dredger was strained, and the oakum seemed to be more or less damaged.

Q. The oakum?

A. The oakum in the seams.

Q. She was leaking, was she?

A. She was leaking, caused by the dredger sinking on uneven ground, giving the dredger a very bad twist in the bottom, so much so that we had to go over and caulk the whole bottom to make it

(Testimony of Wm. E. Palmer.)

tight, while before the accident the dredge did not leak at all.

Mr. FORD.—That is all.

Cross-examination.

Mr. HALL.—Q. Mr. Palmer, you have looked over these bills which have been presented and paid—all the items of them?

A. Yes; after they were rendered I went over them very carefully to see whether they were reasonable, and as far as I could judge, from the information we had from our superintendent in charge of the work, they were correct.

Q. And they were reasonable?

A. Yes, the work was done by skilled men, and as fast as it could be done. [274]

Q. Was there any injury or damage done to the machinery of the boat by reason of having laid in water?

A. Yes, the dynamo was ruined, so we had to get a new dynamo for the electric light system, and the machinery all had to be taken apart and cleaned of the sand and grit that had settled all down through the bearings and the various parts before we could run it.

Q. You looked over this bill, you say, of the Bethlehem Steel Company? A. Yes.

Q. Can you say that those repairs, which you paid for to the Bethlehem Steel Company were the repair of what resulted from the injury that she received there on the piles?

(Testimony of Wm. E. Palmer.)

A. They were to a large extent; we did do a little work to the port corner aft, but we figured that over and made what was, in our judgment, an ample allowance for the work done at that point.

Q. That was deducted from the bill that you have offered in evidence here? A. Yes.

Q. Now, you know that she was towed down the river? A. Yes.

Q. Were those the towing charges paid by the company? A. Yes.

Q. They were the reasonable and regular prices charged?

A. They were the regular going rate for towboats at that time.

Q. And the rent of the steamer that stood by in helping to raise her, were the usual prices that were paid?

A. Yes, they were very much so; the company very much wanted us to relieve the steamers, as they could employ them to better advantage in other work, and it was only on account of our long dealings with them that they wanted to let them stay and furnish the steam necessary for the work.

Q. You consider that the prices you paid were reasonable, under the circumstances? A. I do.

Q. Do you know that there were some repairs made upon the boat and work going on for the purpose of raising her and getting her afloat, so that she could be towed to the drydock? [275]

A. Yes; the only way we could raise her was to cofferdam and shut the water out, in various ways,

(Testimony of Wm. E. Palmer.)

by temporary wooden construction.

Q. Was the cost of that work reasonable under the circumstances? A. Yes.

Redirect Examination.

Mr. FORD.—Q. What was the nature of this work that was done on the port side on the after-end of the boat, that you mentioned, that was not due to the accident?

A. It was removing some of the side timbers, on the side, that showed a little rot; we took them out.

Q. She showed considerable rot, didn't she?

A. At that point, yes.

Q. You say it had not been leaking at all before this?

A. No. These timbers that were removed on account of rot were all above the water line.

Q. All above the water line? A. Yes.

Q. How about the ones below the water line?

A. They were all right.

Q. They were not rotten? A. No.

Q. But this rot was not due to this boat sinking, was it?

A. Not at all; no. While the timbers were rotten, they were not in such shape that they caused any leak even—while I say above the water line, that is true, when the dredger was on an even keel, but when listed probably the water did come up on some of the timbers that were taken out, but they were good enough to hold the oakum, and we only renewed them because we had the dredger down at the yard, and it was a good time to do it.

(Testimony of Wm. E. Palmer.)

Q. It would not have been necessary to renew those if it was not convenient to do it? A. No.

Q. How much longer would those timbers have lasted without renewing, in your judgment?

A. I would say before we would [276] have had to have done anything with them, another four or five years. A lot of these original timbers are in the dredge now.

Q. Were you there when they were cofferdamming these holes?

A. No, I did not go up while it was sunk at all, and that was the time the cofferdamming was done.

Mr. HALL.—The hull was sound for the ordinary purposes for which she was used prior to this accident? A. Yes.

Testimony closed.

[Endorsed]: Filed Jan. 28, 1920. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [277]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Wednesday, the 28th day of January, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 16,630.

OLYMPIAN DREDGING CO. etc.

vs.

SOUTHERN PAC. CO. et al.

Minutes of Court—January 28, 1920—Order Submitting Cause.

After hearing argument by the respective proctors herein of the issues joined herein, the Court ordered that this cause be submitted on records and points and authorities to be filed in three days. [278]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, et al.,

Respondents.

Opinion and Order Dismissing Libel.

HAVEN, ATHEARN, HALL & CHANDLER and JAMES SPILMAN, Esq., Proctors for Libelant.

FORD & JOHNSON, Proctors for Respondents.

MEMORANDUM.

RUDKIN, District Judge.

The question involved in this case is a novel one and its solution is by no means free from difficulty.

Some time prior to the 11th day of June, 1895, the legislature of the State of California authorized the construction of a railroad bridge across the Sacramento River in the vicinity of Sacramento by the California Pacific Railroad Company. On the last-named date the Secretary of War approved the plans and location of the new bridge as provided by law, subject to the following conditions:

"1. That the officer of the United States Army in charge of the District within which the bridge is to be built, may supervise this construction, in order that said plan shall be complied with." [279]

"2. That said Railway Company, within 90 days after the completion of the new bridge shall remove every portion of the present existing bridge, the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of the lowest low water, being a reading of 7.5 feet on the K Street gauge, Sacramento, California."

The new bridge was completed during the latter part of that year and the old bridge was removed

and destroyed during the early part of the following year. This was accomplished by sawing off, breaking and blowing out the piles with dynamite at the bed of the river. Since 1895 there has been a radical change in the flow of the river at the point of the old bridge. While extreme low-water mark at that point in 1895 was fixed by the Secretary of War at 7.5 feet above the K Street gauge, low-water mark in 1918 was approximately seven (7) feet lower still. And, while the surface of the river was several feet lower in 1918 than in 1895 the water in the river was fully as deep in the latter year as in the former. In other words, the bed of the river was likewise several feet lower in 1918 than when the bridge was destroyed in 1895. As a result of this the piling which had been removed considerably below the depth required by the Secretary of War in 1895 extended considerably above the bed of the river in 1918. On the 27th of July, 1918, the dredger "Thor" drifted down the river in the customary way for the purpose of passing through the draw in the railroad bridge below when it came in contact with the piling and the bottom was punctured, causing the dredger to fill with water and resulting in the injury complained of. The change in the river to which I have referred was caused in part by the construction of bulkheads by the Government which changed in a measure the course of the stream but more [280] largely by dredging from the bed of the river immediately below the point of the old bridge. The question presented for decision therefore is, notwithstanding

the fact that the piling or piles were removed by the railroad company in 1895, as required by the Secretary of War, and even to a lower depth, is the railway company nevertheless liable for injuries resulting 22 years later, after the piling had been brought near the surface by the act of the Government in lowering the bed of the stream. In my opinion it is not. While the railroad company was perhaps required to take notice of ordinary changes in the course or channel of the stream from natural causes and provide against any injury that might result from such changes, it could not, in my opinion, be required to take notice of such radical changes as occurred here by the acts of the Government over which it had no control and which it had no reason to anticipate or provide against. No authorities have been cited bearing directly upon the question, but a somewhat similar point was presented in Phila., Wil., and Balt. R. Co. vs. Phil. and Havre de Grace Steam Towboat Co., 64 U. S. 209. In that case a steamboat came in contact with certain piles which contractors had cut off a few feet below the level of the water, and, in discussing the question of liability, the Court said: "During the progress of the work, the contractors had driven certain piles called sight-piles, into the channel of the river, which were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water, so that they became a hidden and dangerous nuisance." Of course the question now before the Court was not there considered but there is a clear implication

that if the piles had been removed or cut off level with the bottom of the river there would be no liability. In this case as appears from the testimony the longest or highest pile found in the river after the accident was upwards of 10 feet below the extreme low-water mark of 1895, when the piles were removed, and three or our feet below the point fixed [281] by the Secretary of War. For upwards of 20 years the piles in no manner interfered with commerce or obstructed navigation and not then until the channel of the stream was lowered several feet by artificial means. The question of proximate cause has been discussed at some length in the briefs but if the railroad company discharged its full duty to the public in 1895 when it removed the piling as directed by the Secretary of War and in a manner which left them no obstruction to navigation under conditions then existing or under any conditions which the railroad company could reasonably anticipate, the question of proximate cause does not arise. The libel must therefore be dismissed and a decree will be entered accordingly.

February 13th, 1920.

[Endorsed]: Filed Feb. 13, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [282]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Final Decree.

This cause came on regularly to be heard on the 3d day of Deceember, 1919. Messrs. Havens, *Athern,* Hall & Chandler and James S. Spilman appeared for libelant, and Messrs. Ford and Johnson appeared for respondents. And evidence having been adduced by the respective parties and the matter having been argued and submitted to the Court for decision, and the Court having fully considered the matter, and it appearing to the Court that the clamshell dredger "Thor" referred to in said libel was not damaged, sunk or injured by any negligent, tortious or unlawful act of the respondents, or either of them, and the Court having ordered that said libel be dismissed,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the libel herein

be and the same is hereby dismissed, and that respondents recover their costs of suit taxed at the sum of $———.

Dated: May 3d, 1920.

FRANK H. RUDKIN,
Judge of the United States District Court. [283]

Due service and receipt of copy of the within Final Decree is hereby admitted this 19th day of April, 1920.

JAMES S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,
Attorneys for Libelant.

Form of decree approved.

HAVEN, ATHEARN, HALL & CHANDLER,
JAMES S. SPILMAN,

[Endorsed]: Filed May 3, 1920. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

Entered in Vol. 9 Judg. and Decrees, at page 472. [284]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Notice of Appeal.

To Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Respondents, and to Messrs. Ford and Johnson, Their Proctors:

You and each of you are hereby notified that Olympian Dredging Company, a corporation, libelant in the above-entitled cause, appeals from the final decree of the Court entered in this cause on May 4, 1920, in favor of the above-named respondents and against the above-named libelant, to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco.

Dated: May 10, 1920.

J. S. SPILMAN,

HAVEN, ATHEARN, HALL & CHANDLER,

Proctors for Libelant and Appellant.

Copy of within notice of appeal received and due service of same acknowledged this 12th day of May, 1920.

FORD & JOHNSON,
Proctors for Respondents,

[Endorsed]: Filed May 13, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [285]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Assignment of Errors.

Now comes Olympian Dredging Company, a corporation, libelant and appellont in the above-entitled cause, and says that in the record, opinion, decision, decree and proceedings therein, there is manifest and material error, and said appellant now makes, files and presents the following assignment oferrors on which it relies, to wit:

I.

The Court erred in holding and deciding that the clamshell dredger "Thor" was not damaged, sunk or injured by any negligent, tortious or unlawful act of the respondents, or either of them.

II.

The Court erred in holding and deciding that the claimshell dredger "Thor" was damaged, sunk and injured by the negligent, tortious and unlawful acts of respondent California Pacific Railroad Company in failing to remove the piles left by it in the Sacramento River at the time of the destruction of the bridge in 1896 in such a manner as to prevent or remove a menace to navigation in said river. [286]

III.

The Court erred in holding and deciding that the piles which were left in the Sacramento River by the respondent California Pacific Railroad Company, at the time of the destruction of the bridge in 1896, did not constitute an unlawful menace and obstruction to navigation, and that said respondent was not responsible for damages resulting from the leaving of said piles in said river.

IV.

The Court erred in holding and deciding that the piles which were left upon the destruction of the bridge across the Sacramento River in 1896 were then removed considerably below the depth required by the Secretary of War, for the reason that there is no evidence in the record to sustain such finding.

V.

The Court erred in holding and deciding that the change in the Sacramento River referred to by the Court in its decision was caused either by the construction of bulkheads by the Government or by dredging of the bed of the river, for the reason that there is no evidence in the record to sustain either of said findings.

VI.

The Court erred in holding and deciding that the piling or piles were removed by the railroad company in 1895, as required by the Secretary of War, for the reason that there is no evidence in the record to sustain said finding.

VII.

The Court erred in holding and deciding that the piling in the Sacramento River referred to in the evidence had been brought near the surface by the act of the Government in lowering the bed of the stream, for the reason that there is no evidence in the record to sustain said finding. [287]

VIII.

The Court erred in holding and deciding that the changes in the Sacramento River, referred to in the evidence and in the opinion of the Court, occurred by reason of the acts of the Government and that the respondents had no reason to anticipate or provide against said changes, for the reason that there is no evidence in the record to sustain either of said findings.

IX.

The Court erred in holding and deciding that

the longest or highest pile found in the Sacramento River after the accident complained of was upwards of ten (10) feet below the extreme low-water mark of 1895 when the piles were removed and that the same was three (3) or four (4) feet below the point fixed by the Secretary of War, for the reason that there is no evidence in the record to sustain either of said findings.

X.

The Court erred in holding and deciding that the channel of the Sacramento River was lowered several feet by artificial means, for the reason that there is no evidence in the record to sustain said finding.

XI.

The Court erred in holding and deciding as a matter of law that the question of proximate cause of the accident and injuries complained of does not arise in said case.

XII.

The Court erred in holding and deciding as a matter of law that the libel herein should be dismissed and in dismissing said libel.

WHEREFORE, in order that the foregoing assignment of errors may be and appear of record, appellant files and presents the same and prays that such disposition be made thereof as is in accordance with law and the statutes of the United States in [288] such cases made and provided, and appellant prays a reversal of the decree herein heretofore made and entered in the above-entitled

cause and appealed from and the entry of a new decree in its favor.

Dated: May 10, 1920.

J. S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,
Proctors for Appellant.

Copy of within assignment of errors received and due service of same acknowledged this 12th day of May, 1920.

FORD & JOHNSON,
Proctors for Respondents.

[Endorsed]: Filed May 13, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [289]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,
Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,
Respondents.

Citation on Appeal (Copy).

The United States of America, to Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Respondents, and to Messrs. Ford and Johnson, Their Proctors, GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office in the District Court of the United States for the Northern District of California, wherein Olympian Dredging Company, a corporation, is appellant, and you, the said Southern Pacific Company, a corporation, and California Pacific Railroad Company, a corporation, are appellees, to show cause, if any there be, why the decree against the appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK H. RUDKIN, Judge of the District Court of the United States for the Northern District [290] of California, this 13 day of May, 1920.

FRANK H. RUDKIN,
United States District Judge.

Due and proper service of the above and forego-

ing citation is hereby accepted and acknowledged this 13th day of May, 1920.

FORD & JOHNSON,
Proctors for Respondents and Appellees.

[Endorsed]: Filed May 17, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [291]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Stipulation (and Order) in Re Transmittal of Original Exhibits.

It is hereby stipulated between the libelant and the respondents, by their respective proctors, that none of the exhibits on file in this cause need be copied in the apostles, but that all original exhibits now on file in this cause shall be transmitted to the Appellate Court.

Dated: this 12th day of May, 1920.

J. S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,
Proctors for Libelant.
FORD & JOHNSON,
Proctors for Respondents.

Order in Re Transmittal of Original Exhibits.

The foregoing stipulation is hereby approved and it is accordingly ordered that none of the exhibits now on file in this cause need be copied in the apostles, but that all the original exhibits shall be forwarded by the clerk of this court to the clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated: May 13th, 1920.

FRANK H. RUDKIN,
Judge of the United States District Court.

[Endorsed]: Filed May 13, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [292]

Certificate of Clerk U. S. District Court to Apostles on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 292 pages, numbered from 1 to 292, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of Olympian Dredging Company, a Corp., Libelant, vs. Southern Pacific Company, a Corp., et al., Respondents, No.

16,630, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of which is embodied herein), and the instructions of the proctors for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of One Hundred Twenty-seven Dollars and Seventy-five Cents ($127.75), and that the same has been paid to me by the proctors for the appellant herein.

Annexed hereto is the original citation on appeal, issued herein (page 294).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of July, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [293]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 16,630.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Citation on Appeal (Original).

The United States of America, to Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Respondents, and to Messrs. Ford and Johnson, Their Proctors, GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office in the District Court of the United States for the Northern District of California, wherein Olympian Dredging Company, a corporation, is appellant, and you, the said Southern Pacific Company, a corporation, and California Pacific Railroad Company, a corporation, are appellees, to show cause, if

any there be, why the decree against the appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRANK H. RUDKIN, [294] Judge of the District Court of the United States for the Northern District of California, this 13th day of May, 1920.

FRANK H. RUDKIN,
United States District Judge.

Due and proper service of the above and foregoing citation is hereby accepted and acknowledged this 13th day of May, 1920.

FORD & JOHNSON,
Proctors for Respondents and Appellees. [295]

Service of within by copy is hereby admitted this 13th day of ———, A. D. 19—.

———————,
Attorney for ———.

[Endorsed]: No. 16,630. In the Southern Division of the United States District Court, for the Northern District of California, First Division. In Admiralty. Olympian Dredging Company, a Corporation, Libelant, vs. Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Respondents. Citation on Appeal. Filed May 17, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3527. United States Circuit Court of Appeals for the Ninth Circuit. Olym-

pian Dredging Company, a Corporation, Appellant, vs. Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Appellees. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed July 30, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

OLYMPIAN DREDGING COMPANY, a Corporation,

Libelant and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Respondents.

Stipulation Extending Time to and Including July 31, 1920, for Filing Apostles on Appeal.

It is hereby stipulated that the appellant's time for filing in the Circuit Court of Appeals for the Ninth Circuit the apostles upon the appeal of the

libelant in the above-entitled cause which was filed in the office of the clerk of the District Court for the Northern District of California on May 13, 1920, may be extended by the above-entitled court to and including the thirty-first day of July, 1920, and it is further stipulated that the order for such extension may be made by the above-entitled court *nunc pro tunc* as of June 12, 1920, and may be ordered filed and *nunc pro tunc* as of that date.

Dated: June 24th, 1920.

J. S. SPILMAN,
HAVEN, ATHEARN, HALL & CHANDLER,
Proctors for Libelant and Appellant.

GEO. K. FORD,
FORD & JOHNSON,
Proctors for Respondents.

Order Extending Time to and Including July 31, 1920, for Filing Apostles on Appeal.

Pursuant to the above stipulation, it is hereby ordered that the appellant's time for filing in this Court the apostles on its appeal, referred to in the above stipulation, is hereby extended to and including July 31, 1920, and that this order be filed by the clerk of the above-entitled court *nunc pro tunc* as of June 12, 1920.

Dated: June 24, 1920, *nunc pro tunc* as of June 12, 1920.

WM. H. HUNT,
United States Circuit Judge for the Ninth Circuit.

[Endorsed]: No. 3527. In the United States Circuit Court of Appeals for the Ninth Circuit. Olympian Dredging Company, a Corporation, Libelant and Appellant, vs. Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Respondents. Stipulation and Order Extending Time for Filing Apostles on Appeal. Filed Jun. 24, 1920. F. D. Monckton, Clerk. Refiled Jul. 30, 1920. F. D. Monckton, Clerk.

[Endorsed]: Printed Apostles on Appeal. Filed October 23, 1920. F. D. Monckton, Clerk.

No. 3527

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant.

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees,

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Libelant's Exhibit No. 1, Excepting Maps, and Certificate of Secretary of War.

Whereas, By Section 3 of an act of Congress, approved July 13, 1892, entitled "An act making appropriation for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," it is declared that it shall not be lawful to construct by authority of the legislative act of a State any bridge, not already authorized by law, over a navigable water of the United States wholly within the limits of such State, without the approval by the Secretary of War of the location and plans of such bridge;

And whereas, The California Pacific Railroad Company, having authority under an act of the legislature of the State of California to construct a bridge over Sacramento River, at Sacramento, in said State, has submitted a map of the location and plans of the same.

Now therefore, This is to certify that the map of location and plans of said bridge, which are hereto attached, are hereby approved by the Secretary of War, subject to the following conditions:

1. That the Engineer Officer of the United States Army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with.

2. That said railroad company, within ninety days after the completion of the new bridge, shall remove every portion of the present existing bridge,

the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of lowest low-water, being a reading of 7.5 feet on K. Street gauge, Sacramento, California.

3. That after the present bridge is removed, said company shall furnish and place, at its own expense, immediately above and below the draw opening of the new bridge such clusters of piles as may be required by the Secretary of War in the interests of navigation.

WITNESS my hand this 11th day of June, 1895.

[Seal] DANIEL S. LAMONT,
Secretary of War.

[Stamped]: Office of Chief of Engineers, War Department, Jun. 12, 1895. 10729/25.

[Endorsed]: Libelant's Exhibit No. 1, Excepting Maps, and Certificate of Secretary of War. Filed July 30, 1920. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-fifth day of October, in the year of our Lord one thousand, nine hundred and twenty. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable WILLIAM A. HUNT, Circuit Judge.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Order of Submission.

ORDERED appeal in the above-entitled cause argued by Mr. Frank Hall, proctor for the appellant, and by Mr. George K. Ford, proctor for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof,in the City and County of San Francisco, in the State of California, on Monday, the seventh day of February, in the year of our Lord one thousand, nine hundred and twenty-one. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * Olympian Dredging Company, a Corporation, Appellant, vs. Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation, Appellees. No. 3527.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Before GILBERT, MORROW and HUNT, Circuit Judges:

Libel *in personam* against the Southern Pacific Company and California Pacific Railroad Company filed by Olympian Dredging Company to recover damages arising out of a collision of the dredger "Thor" with certain submerged piles in the Sacramento River. The allegations of the libel are that the piles were negligently left in the river by the respondents at the time of the removal of a certain railroad bridge.

The District Court dismissed the libel on the ground that there was no liability and from a decree entered in favor of the respondents appeal was taken. In brief the evidence showed these facts:

In 1858 a wagon road bridge was built across the Sacramento River connecting the city of Sacramento with the county of Yolo in California. In 1869 the California Pacific Railroad Company, respondent, obtained a franchise to run its railroad across the 1858 bridge. In 1878 the California Pacific Railroad Company built another bridge above the 1858 bridge, and the 1858 bridge was destroyed. Later, in 1896, the 1878 bridge was destroyed. In 1895 the California Pacific Railroad Company had permission from the War Department of the United States to build another bridge

across the Sacramento River. In 1909 another bridge was built above the 1895 bridge. It will thus be observed that the 1858 and 1878 bridges were located above the present, or 1909, bridge, while the 1895 bridge was below the present bridge.

About midnight of July 13, 1918, the dredger "Thor," 120 feet long, 58 feet wide, drawing between five and six feet of water, was moving down the Sacramento River drifting with the current, with the bow of the dredge upstream, and when about to enter the draw of the present or 1909 bridge she struck upon one or more partially destroyed piles, and her hull was pierced and she sank, in about the center of the east draw channel of the 1909 bridge. The divers said that there was a bulge about four feet square in the upper floor inside of the hull underneath the hatch; that there was also a hole with a pile sticking up on the aft end of the port side on the Yolo County side; that there was also a hole in the rake where a pile from a cluster went through; that the tops of these piles were ragged as though they had been blasted off, not sawed off square; that some stuck up four or five feet higher than others; that they sawed off several feet of these piles in order to free the dredge. The depth of the water in the draw at the time of the collision was not less than seven feet, and according to respondent's diagram put in evidence the tallest pile of a certain cluster in the river was 4 feet, 6 inches below zero on what is called the K street Sacramento gauge. But it is plain that there was not sufficient clearance for the dredge when the accident occurred.

When the War Department gave a permit to the California Pacific Railroad Company to build the 1895 bridge, one of the conditions imposed was that the Railroad Company remove the piles constituting the structure of the 1878 bridge, "to a depth of seven feet below the level of the lowest low-water, being a reading of 7.5 feet on the Sacramento, California, K street gauge." Accordingly some of the piles of the 1878 bridge were blown off by dynamite placed in the river-bed against the piles, and some appeared to have been cut off several feet below the bed of the stream as it existed at that time. The bed of the river was lowered in 1893 by the construction of a jetty by the Government on the Yolo side of the river just above the point where the accident occurred, and some dredging was done by the Government at a point below the place of the accident. Undoubtedly there has been a "scouring out" of the river for many years and there was a material change in the flow at the point of the 1878 bridge, so that the extreme low-water mark, as fixed by the Secretary of War in the original permit, was, in 1918, approximately seven feet lower, although the depth of water was really not less. Obviously, under such conditions piling which had been blown or cut off in 1895 below the mark prescribed by the War Department extended much higher above the low-water mark when the "Thor" was damaged.

HUNT, Judge.—When the Railroad Company built the new bridge there was an obligation upon it to remove any piling that had been used in sup-

port of the 1878 bridge and which then constituted an obstruction to navigation, or which, considering the general character of the Sacramento River and the reasonable probability that in the future its bed in that vicinity would be materially shifted would become an obstruction. We believe such a standard is correct generally, and is to be applied to the facts of the present case where the Railroad Company knew that the channel of the river was a shifting one, and with such knowledge left piles standing in the bed of the river at places where it was reasonably probable the channel would shift. The piles could have been removed entirely, but for reasons of its own not material at all to be inquired into, the company chose to cut the piles off and to leave them submerged where under changed conditions which ought to have been anticipated and guarded against they became a positive menace to navigation. It is of course highly important that there be no unnecessary obstruction to the navigation of rivers; hence, it is a salutary rule that one who lawfully constructs a bridge across a river for railroad or business purposes must not only not obstruct free navigation at the time of construction but must exercise diligence in guarding against dangers fairly to be anticipated. Among cases bearing upon the question we cite: Vessel Owners Towing Co. vs. Wilson, 63 Fed. 626; N. P. R. Co. vs. United States, 104 Fed. 691; State vs. So. Carolina R. Co., S. C., 4 S. E. 796. Philadelphia W. & P. R. Co. vs. Philadelphia & Havre de Grace St. Co., 64 U. S. 209, is cited by both

sides. There the piles in the channel were cut off under the surface of the water and became a hidden and dangerous nuisance as the result of negligence in cutting off the piles "not at the bottom of the river but a few feet under the surface of the water." We cannot draw the implication that the Supreme Court meant that if the piles had been cut off at the bottom of the river, negligence could not be inferred. On the contrary, the Court said it was the duty of the Railroad Company to take care that all the obstructions to the navigation which had been placed in the channel by their orders and for the purpose of their intended erection should be removed. Thus it seems to us was a general obligation recognized.

Respondents say that the act of the Railroad Company in leaving the piles in the river-bed was not the proximate cause of the accident, but that the construction of the jetty above the bridge site and the dredging operations below it were the cause. It may be granted that those two latter things had the effect of changing the channel of the river, and that as a result the level of the river was reduced. But when the 1878 bridge was destroyed in 1895 the Railroad Company knew that the channel was shifting and knew that in 1893 the Government had constructed a wing dam directly by the 1878 bridge for the very purpose of throwing the current of the river and the channel from the Yolo to the Sacramento side. For years there was knowledge that the shifting current would in all probability change the channel over

to where the piles were submerged in the bed, and in constructing the later bridges, the draw span was moved farther over toward the Sacramento side.

Under the circumstances and with the knowledge possessed, we think the Railroad Company cannot avoid liability upon the ground of an intervening cause. It was the failure to remove the piles left in the shifting stream that caused the damage and the shifting of the channel so far as it became a contributing force ought reasonably to have been considered. The Santa Rita, 176 Fed. 890; Vessel Owners Towing Co. vs. Wilson, 63 Fed. 626. Nor is the question of liability affected by the fact that the conditions imposed by the War Department were complied with, for plainly the restrictions so imposed did not define the measure of liability of the Railroad Company to third persons rightfully navigating the river. Maxon et al. vs. C. & N. W. R. R. Co., 122 Fed. 555. It is said that the liability of the Southern Pacific Company has not been established. The evidence is that the 1878 bridge was destroyed by the maintenance forces of the Southern Pacific Company, and that the permit for the construction of the 1895 bridge had been issued by the Government to the California Pacific Railroad Company, it being the custom for permits for bridges to issue to the corporations, not necessarily the leasing and operating company. It appeared that the Southern Pacific Company leased the California Pacific Railroad Company under an agreement dated November 1, 1886, and that the pro-

visions of the lease made it the duty of the Southern Pacific Company to keep and maintain the property leased in good order, condition and repair and operate, maintain and add to and better the same at its own expense. If it be assumed that there was no obligation under the lease which required the Southern Pacific Company perpetually to care for property abandoned by the California Pacific Company, it is none the less true that the Southern Pacific built the 1895 bridge and destroyed the 1878 bridge, and in a practical way interpreted the provisions of the lease as requiring it not only to build the bridge that it built, but to do those things which it was under obligation to do in the way of keeping the channel free from obstructions which had been left there at the time of the construction of the 1895 bridge.

The decree dismissing the libel is reversed and the cause is remanded with directions to determine the amount of the appellant's damages upon the evidence in the case, and enter a decree therefor.

[Endorsed]: Opinion. Filed February 7, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Decree U. S. Circuit Court of Appeals.

Appeal from the Southern Division of the District Court of the United States for the Northern District of California, First Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, First Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court dismissing the libel in this cause be, and hereby is, reversed, with costs in favor of the appellant and against the appellees, and the cause is remanded to the said District Court with directions to determine the amount of the appellant's damages upon the evidence in the case, and enter a decree therefor.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellees for its costs herein expended, and have execution therefor.

[Endorsed: Decree. Filed and entered February 7, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the ninth day of March, in the year of our Lord one thousand, nine hundred and twenty-one. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Order Denying Petition for a Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the case was heard, it is ORDERED that the petition, filed March 8, 1921, on behalf of the appellees for a rehearing of the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Praecipe for Transcript of Record.

To the Clerk of the said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals), and not less than nine uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under Section 240 of the Judicial

Code, in the above-entitled cause, the said Transcript to consist of a copy of the following:

1. Printed Transcript of Record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Order of submission, entered October 25, 1920;

3. Order directing filing of opinion, etc., entered February 7, 1921;

4. Opinion, filed February 7, 1921;

5. Decree, filed and entered February 7, 1921;

6. Order denying petition for rehearing, entered March 9, 1921;

7. Praecipe for transcript of record, filed April 2, 1921; and

8. Certificate of Clerk U. S. Circuit Court of Appeals to said transcript.

GEO K. FORD and
E. J. FOULDS,
Counsel for the Appellees.

Service of a copy of the within praecipe is hereby admitted this 2d day of April, A. D. 1921.

HAVEN, ATHEARN, HALL & CHANDLER,
Counsel for the Appellant.

[Endorsed]: Praecipe for Transcript of Record. Filed April 2, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Amendment to Praecipe for Transcript.

To the Clerk of the said Court:

Sir: Please include in the printed transcript of record in addition to the matters specified in praecipe filed April 2, 1921, the following, viz.: Copy of Libelant's Exhibit No. 1 (excepting therefrom the maps and the certificate as to the correctness of the copy).

GEO. K. FORD and
E. J. FOULD,
Counsel for the Appellees.

Service of a copy of the within praecipe is hereby admitted this 5th day of April, A. D. 1921.

HAVEN, ATHEARN, HALL & CHANDLER,
Counsel for the Appellant.

[Endorsed]: Amendment to Praecipe for Transcript. Filed April 5, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing four hundred and sixteen (416) pages, numbered from and including 1 to and including 416, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, excluding all original exhibits, excepting portion of Libelant's Exhibit No. 1, made pursuant to praecipe of counsel for the appellees, filed on the 2d and 5th days of April, A. D. 1921, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of April, A. D. 1921.

[Seal]

F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Olympian Dredging Company is appellant, and Southern Pacific Company and California Pacific Railroad Company are appellees, No. 3527, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Joseph McKenna, Senior Associate Justice of the Supreme Court of the United States, the fourth day of June, in the year of our Lord one thousand nine hundred and twenty-one.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28258. Supreme Court of the United States, October Term, 1920. No. 901. Southern Pacific Company et al., vs. Olympian Dredging Company. Writ of Certiorari. Docketed. No. 3527. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 14, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation, Appellees.

Stipulation as to Transcript of Record in the Supreme Court of the United States.

It is hereby stipulated and agreed by and between the appellant and the appellees above named, that the certified transcript of the record in said case, heretofore filed in the Supreme Court of the

United States with the appellees' petition for writ of certiorari, together with the copies of the exhibits thereto attached, shall stand and be considered as the return to the writ of certiorari heretofore issued by the Supreme Court of the United States in the case pending in said court entitled Southern Pacific Company, et al., petitioners, vs. Olympian Dredging Company, respondent, and numbered 901 of October Term 1920, said writ of certiorari having thereafter been filed in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 4, 1921.

JAMES S. SPILMAN,
HAVEN, ATHEARN, CHANDLER & FARMER,
Counsel for Appellant.
GEO. K. FORD,
E. J. FOULDS,
Counsel for Appellees.

Endorsed: Stipulation as to return to writ of certiorari. Filed Aug. 5, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 5th day of August, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of August, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3527.

OLYMPIAN DREDGING COMPANY, a Corporation, Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation, Appellees.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified Transcript of the Record, together with the copies of the exhibits thereto attached, heretofore filed by the plaintiff in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 5th day of August, A. D. 1921.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of August, A. D., 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,

By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] File No. 28258. Supreme Court U. S., October Term, 1921. Term No. 315. Southern Pacific Co., et al., petrs., vs. Olympian Dredging Co. Writ of certiorari and return. Filed August 16th, 1921.

In the Supreme Court

OF THE

United States

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Petitioners,

vs.

OLYMPIAN DREDGING COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Southern Pacific Company and California Pacific Railroad Company, respectfully pray for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals, in and for the Ninth Circuit, rendered on the 7th day of February, 1921 (R., p. 405), and a decree of said court entered pursuant thereto, reversing a decree of the Southern Division of the United States District Court for the Northern District of California, First Division, dated May 3, 1920 (R., p. 377), dismissing a certain libel filed by Olympian Dredging Company against your petitioners in *persona* in Admiralty for damage resulting from a collision of the dredger "Thor," belonging to the Olympian

Dredging Company, with certain submerged piles in the Sacramento River, in California, all as more particularly appears from the transcript of record of said case filed herewith, the decree of said Circuit Court of Appeals, entered in accordance with its said decision appearing at page 412 of the record.

After the date of said decision by said Circuit Court of Appeals, and within the time allowed by law, your petitioners filed with said Circuit Court of Appeals a petition for rehearing of said case, which petition was denied by said Circuit Court of Appeals on the 9th day of March, 1921, all as appears from said transcript filed herewith, at page 414 thereof.

This application is made under the provisions of Section 240 of the Judicial Code.

STATEMENT OF THE CASE.

Respondent, as libellant, in the United States District Court, and appellant in the United States Circuit Court of Appeals, filed a libel against petitioners (respondents in the court below), alleging that on the 13th day of July, 1918, the said dredger "Thor," being operated by libellant down the Sacramento River, collided with the stumps of certain piles in the bed of said river and said stumps of piles punctured the hull of said dredger and the said dredger sank in the Sacramento River and that the hull and machinery of said dredger were dam-

aged to the amount of $18,493.72, for which amount a decree was prayed in favor of libellant and against the respondents (your petitioners). (Tr., pp. 9 and 10.)

Prior to the year 1895 there was a certain drawbridge maintained across the Sacramento River for the purpose of carrying the trains of California Pacific Railroad Company. In 1895 respondents constructed across the Sacramento River in the immediate vicinity of said bridge a new bridge to take the place thereof, which new bridge was erected by authority of the Secretary of War, and the bridge which had formerly been maintained by your petitioners was removed, pursuant to the terms and conditions of said permit issued by said Secretary of War, which permit is as follows:

"Libellant's Exhibit No. 1.

* * * * * *

2. That said railroad company, within ninety days after the completion of the new bridge, shall remove every portion of the present existing bridge, the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of lowest low-water, being a reading of 7.5 feet on K Street gauge, Sacramento, California.

* * * * * *

Witness my hand this 11th day of June, 1895.

(Seal) DANIEL S. LAMONT,
Secretary of War."

This permit was introduced in evidence by libellant as Libellant's Exhibit No. 1 (R., p. 401).

In 1896 your petitioners removed said old bridge from the Sacramento River in conformity with the requirements of the Secretary of War, as set forth in said permit. It is not disputed that the requirements in the permit of the Secretary of War as to the removal of the old bridge were fully complied with by your petitioners.

Your petitioners, in fact, exceeded the requirements of the permit by blasting off the piles which formerly supported the old bridge to a point below the bed of the Sacramento River and for a period of twenty-two years thereafter said piles did not interfere with navigation.

By reason of a jetty having been erected by the Government, just above the place where the accident in question occurred and by reason of the river having been subsequently dredged out by the Government at a point below the place of the accident in question, the bed of the Sacramento River at this point was gradually lowered after the time of the removal of said old bridge, and this lowering of the bed of the river permitted the stub ends of the piles of the old bridge which had theretofore been blasted off below the bed of the river to protrude again to such an extent as to cause the accident complained of in 1918. Such stub ends of piles were

nevertheless below the surface of the water in 1918. At the time of this accident during the latter part of the summer of 1918, when the river was very low, the stub ends of the piles were within 7.7 feet of the surface of the water at high water and 4.5 feet of the surface of the water at low water.

It does not appear that your petitioners had any knowledge that the stub ends of the old piles were protruding from the bed of the river in 1918 or that they were a menace to navigation.

Neither of your petitioners were in possession of any of their railroad properties in 1918, and had no employees on the ground who could have had knowledge of the facts. On December 28, 1917, the President of the United States had taken possession and assumed control of all of the railroads and systems of transportation of the United States, including the railroad systems and properties of your petitioners and at all times between said date and the date subsequent to the date of said accident, all of said railroads and properties were under Federal control, within the meaning of the act of Congress approved March 21, 1918, and all of said railroad properties at the time of said accident were in the possession and control of the Director General of Railroads and his employees.

At no time between the time said bridge was removed in 1896 and the summer of 1918, when said

accident occurred, were the stub ends of said piles so near the surface of the water as to constitute any menace to navigation.

Said case was tried in the Southern Division of the United States District Court in and for the Northern District of California, First Division, which rendered a decree dismissing said bill (R., p. 377). The said libellant appealed from said decree to the United States Circuit Court of Appeals in which Court an opinion was filed on February 7, 1921, reversing the decree of the lower Court dismissing said libel, and remanding said cause with directions to determine the amount of the damage to said dredger and to enter a decree therefor (R., p. 412).

GENERAL REASONS RELIED ON FOR ALLOWANCE OF WRIT.

I.

That the compliance by petitioners in 1896 with the requirements specified by the Secretary of War in his formal permit is full performance of all obligations in the matter on the part of these petitioners.

II.

That the accident involved is not the result of any negligence on the part of petitioners.

III.

That the compliance by petitioners with the re-

quirements of the Secretary of War, as aforesaid, cannot constitute negligence on their part, and that the said permit and requirements of the Secretary of War are final and conclusive as to what should be done to remove any menace to navigation.

IV.

That having complied with the requirements of said Secretary of War and removed all obstructions to navigation, as required by the Secretary of War, petitioners were not under any obligation to maintain the channel against any subsequent obstructions to navigation.

V.

That in 1918 when the accident occurred, neither of said petitioners were in possession or in control of their railroad properties and the duty, if any, with respect to the maintenance of said railroad properties in such manner as not to interfere with navigation of any river rested wholly upon the Director General of Railroads.

Your petitioners present herewith as a part of their petition a brief giving more fully their arguments upon the questions involved, together with a certified copy of the entire transcript of record in the case, including the proceedings in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Wherefore, your petitioners pray that a writ of certiorari be issued out of this Court, directed to said United States Circuit Court of Appeals in and for the Ninth Circuit, and to said Southern Division of the United States District Court in and for the Northern District of California, First Division, requiring them and each of them to send to this Court on a day certain to be designated, a full and complete transcript of the record of the proceedings of said Courts in the above entitled matter, to the end that the decrees of said Courts may be reviewed as provided by law, and that this Honorable Court may thereupon proceed to correct the errors complained of, reverse said judgment of said United States Circuit Court of Appeals and affirm the decree heretofore entered in said United States District Court dismissing the libel in said case, and your petitioners will ever pray, etc.

SOUTHERN PACIFIC COMPANY.

CALIFORNIA PACIFIC RAILROAD COMPANY.

By E. J. FOULDS and

ELMER WESTLAKE,

Attorneys for said Petitioners.

GEO. K. FORD,

ELLIOTT JOHNSON,

Of Counsel.

State of California,
City and County of San Francisco.—ss.

Elmer Westlake, being first duly sworn, deposes and says: That I am an attorney and counsellor of the Supreme Court of the United States and am one of the attorneys for the petitioners named in the foregoing petition for writ of certiorari; that the allegations of said petition are true as I verily believe. The points raised therein are in my opinion meritorious. Said petition is not filed for the purpose of delay.

Elmer Westlake

Subscribed and sworn to before me this 25th day of April, 1921.

Frank Harvey.

Notary Public in and for the City and County of San Francisco, State of California.

Seal.

In the Supreme Court

OF THE

United States

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Petitioners,

vs.

OLYMPIAN DREDGING COMPANY, a Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This is a suit in admiralty in which the judgment of the United States Circuit Court of Appeals is made final by the provisions of the Judicial Code, subject to review by the United States Supreme Court by certiorari under Section 240 of the Judicial Code.

Your petitioners ask for a writ of certiorari to review a decision of United States Circuit Court of Appeals in said case entered on February 7, 1921, in which case petitioners' petition for rehearing was denied by said Court on March 9, 1921. Said

United States Circuit Court of Appeals then and there reversed a decree entered in said case by the lower court dismissing a certain libel filed against your petitioners. Said United States Circuit Court of Appeals, by its said judgment, held your petitioners guilty of negligence because of their failure in 1896 to completely remove certain piles from the bed of the Sacramento River, California, that formerly supported an old railroad bridge which belonged to your petitioners, and held your petitioners responsible for damages to the dredger "Thor," which in 1918 collided with the stub ends of such piles which had again protruded from the bottom of said river through the subsequent scouring out and lowering of the bed of said river through no fault of your petitioners, even though in 1896 your petitioners had broken or blasted off said piles at or below the bottom of said river and fully complied with all requirements specified by the Secretary of War as to the removal of such piles.

QUESTION INVOLVED IS NOVEL AND IMPORTANT.

The question presented here for determination has, so far as your petitioners know, never been directly passed upon in this country. The question is whether a full compliance with all requirements specified by the Secretary of War in an order for the removal of obstructions in navigable waters of the United States is negligence on the part of those who complied with such order of the Secretary of War; and the further question of whether the re-

moval of piles from a navigable stream in full compliance with such order, and to or below the level of the bottom of the stream is not a full and complete compliance with all obligations on the part of those who formerly maintained such obstruction to navigation.

Said decision sought to be reviewed would establish a new, uncertain and dangerous precedent and impose enormous liabilities in every case where wharves, piers or bridges have been removed in compliance with the requirements of the Secretary of War, even generations afterwards, where through some natural or artificial change in the navigable channels the foundations of such wharves, bridges or piers formerly below the bottom of the water ways should again protrude and create a hazard.

ARGUMENT.

When an order was made by the Secretary of War in 1896 designating the manner in which the old bridge over the Sacramento River should be removed, and when this order was complied with, and even more than complied with, by your petitioners, they cannot be held guilty of negligence in so complying with such requirements, and their obligation to any subsequent user of the stream was extinguished. It cannot reasonably be contended that your petitioners should have set up their judgment as to how such obstructions to navigation should be removed against the judgment of the Sec-

retary of War, and they were authorized and justified in considering his requirements suffcient and in acting on the faith thereof.

Congress has placed jurisdiction over navigable waters of the United States in the Secretary of War and any obstructions to navigation permitted by the Secretary of War are lawful.

At the time of the removal of said old bridge there was in force Section 7 of the Act of July 13, 1892 (27 Stats. at L. 110), amending the River and Harbor Act of September 19, 1890 (26 Stats. 426), as follows:

> "Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in

any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War."

The only decision of this court, so far as we know, touching upon the liability after the removal of piles to the bottom of a navigable water is the case of *Philadelphia etc. Co.* vs. *Philadelphia etc. Co.*, 64 U. S. 209, where the court says:

> "During the progress of the work the contractors had driven certain sight piles into the channel of the river *which were not removed or cut off level with the bottom* but were cut a few feet under the surface of the water so that they became a hidden and dangerous nuisance."

And again:

> "But as the driving of the piles for the legitimate purpose of the erection was by authority of law and in pursuance of the contract, the contractors had done no wrong in placing them there. The nuisance was the result of the *negligence in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water.* This the contractors were bound to do after the piles had served their legitimate purpose in the construction of the bridge and after they had completed their contract."

A recovery by the libellant must necessarily have as its foundation some tortious act. Here no act of the petitioners was negligent. In 1896 the order

of the Secretary of War respecting the removal of the piles was carried out, and in carrying out this order *no menace to navigation was left in the river.* Can an act done in 1896, not tortious in its nature, be changed in character in 1918? The highest authority in the country, the authority charged with the duty of making navigation in this river safe, determined that a removal of the piles as accomplished, was sufficient to meet all requirements. An individual is certainly not in the exercise of reasonable care to be held to a keener degree of foresight than is the government.

The leaving of the stumps in the river bed was not a negligent act and could have caused no injury to anyone *were it not for the unforeseen intervening acts of others over which the petitioners had no control whatever.* The facts here do not meet the requirements of proximate cause as defined in *Milwaukee Ry.* vs. *Kellogg,* 94 U. S. 469, as follows:

> "* * * It is generally held that, in order to warrant a finding that negligence, or an act not amounting to a wanton wrong is the proximate cause of an injury, it must appear that the injury is the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances."

The intervening acts of the government in constructing a jetty above the site of the piles and in dredging the channel below, caused the stumps to become dangerous in a year of unprecedented low

water. No one could foresee the changes thus made in 1896.

An unforeseen intervening cause, which makes a harmless act become a harmful one, severs any causal connection between the act and the injury.

29 *Cyc.* 499, 500.

Schwartz vs. *California Gas etc. Co.,* 163 Cal. 398, at 402, the Court says.

> "* * * The rule is well settled that an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause. (*Chicago etc. Ry. Co.* vs. *Elliott,* 55 Fed 949 (20 L. R. A. 582, 5 C. C. A. 347); *Cole* vs. *German Savings and Loan Society,* 124 Fed. 115 (63 L. R. A. 416, 59 C. C. A. 593); *Western Union Tel. Co.* vs. *Schriver,* 141 Fed. 550 (4 L. R. A. (N. S.) 678, 72 C. C. A. 596)."

A compliance with the order of the War Department cannot be the basis of a tort, for the reason that the findings of the Secretary of War are *final* and *conclusive* as to what is and what is not an unlawful obstruction.

That the findings of the Secretary of War are final on the subject of obstructions is definitely determined by *Monongahela Bridge Co.* vs. *United States,* 216 U. S. 177, 195.

> "* * * Congress intended by its legislation to give the same force and effect to the decision

> of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress under the Constitution, to regulate the right of navigation by all appropriate means, *to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the Court or by juries.*"

Likewise *Union Bridge Co.* vs. *United States,* 204 U. S. 364.

If the finding of the Secretary of War is final and conclusive on this subject, the Court in this case exceeded its functions in attempting to set up its judgment as to what constitutes a menace against that of the duly delegated authority.

The petitioners are under no obligation to maintain the Sacramento River channel free from obstructions, appearing subsequent to their compliance with the order of the Secretary of War.

The order of the Secretary of War being complied with, the obligation of the petitioners growing out of the construction of the destroyed bridge ceased. The piles in 1896 were not a menace. That they became such at a later date would place these piles in no other or different category than snags of natural origin. The petitioners would not be liable for damage caused by natural snags, and are not liable for damage caused by these piles.

The War Department is charged with the duty of keeping open navigable waters and removing obstructions therefrom, and it could not reasonably be contended that once having fully removed all obstructions which they had placed in the river, these petitioners could be charged with responsibility for future obstructions to navigation.

> *Act of March* 3, 1899 (30 Stats. at Large 1151).

At the time of the injury, neither of the petitioners were in possession or in control of their properties and could exercise no jurisdiction or authority in connection therewith. The accident took place on July 13, 1918. At this time the duty, if any there was, to prevent these piles becoming a menace rested upon the Director General of Railroads.

On December 27, 1917, under authority of Congress, the President of the United States by proclamation to that end, took, on behalf of the federal government, the possession, operation and control of all of the operative properties of the Southern Pacific Company, and was in the possession and control of such properties at the time of the accident. The period of federal control continued until February 28, 1920.

The government assumed all operating expenses during federal control, and as any liability in this

case would be an operating expense, the Government is solely and directly liable therefor.

Act of March 21, 1918. Chapter 25, 40 Stats.

The decision of Judge Rudkin of the United States District Court, in this case appearing at page 377 of the record is unimpeachable and confirms the conclusiveness of action by the Secretary of War as to the navigability of waters under his jurisdiction. The decision is sound in principle and logic, is supported by the only expressions on the subject by this Court and should be affirmed.

It is therefore respectfully submitted, that a writ of certiorari should issue as prayed.

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IN THE

Supreme Court of the United States

No. 78.—October Term, 1922.

Southern Pacific Company, a Corporation, and California Pacific Railroad Company, a Corporation,
Petitioners,

vs.

Olympian Dredging Company, a Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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OUTLINE OF ARGUMENT.

I. Both the lower courts have found that the construction of the wing dam above the site of the 1895 bridge, and, more largely, the dredging of the river immediately below it, had the effect of lowering the bed of the river and changing its course, thereby causing the protrusion of the piles above the bed of the river; hence the intervening action of the Government was the proximate cause of the injury.

II. No action of negligence on the part of the railroad companies is shown, both the lower courts having found that the piles were removed below the depth fixed by the Secretary of War.

III. The Engineering Department of the Government in charge on the Sacramento River, having undertaken to remove the piles, the railroad companies had no further responsibility in the matter.

IV. The determination of the Secretary of War that the piles should be removed to a certain depth only was final and conclusive on all parties, including the railroad companies, and relieved the latter of any further responsibility in the matter.

ALPHABETICAL LIST OF AUTHORITIES CITED.

Baker v. Schofield, 243 U. S. 114.

City of Memphis v. Board of Directors of the St. Francis Levee District, 231 Fed. 217, 222-3.

Farmers State Bank v. Freeman, 249 Fed. 579, 581.

Frost vs. Washington Railroad, 96 Maine, 76.

La Bourgone, 210 U. S. 95, 114.

Lynah v. United States, 188 U. S. 445.

Maine Water Co. vs. Knickerbocker Co., 99 Maine, 473.

Maxon, *et al.*, v. Chicago & Northwestern Railway Co., 122 Fed., 555.

In Miller v. Mayor of New York, 13 Blatchford, 469.

Monongahela Bridge Co. vs. United States, 216 U. S., 177, 195.

Milwaukee Ry. vs. Kellogg, 94 U. S. 469.

Philadelphia, W. & R. R. Co. v. Philadelphia & Havre de Grace Steamboat Co., 23 How., 209, 217.

The Plymouth, 225 Fed., 483.

Schwartz vs. California Gas, etc., Co., 163 Cal., 398, at 402.

Scranton v. Wheeler, 179 U. S. 141.

Union Bridge Co. vs. United States, 204 U. S. 364.

United States v. Cress, 243 U. S. 316.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

This is a libel in *personam* against Southern Pacific Company and the California Pacific Railroad Company, filed by the Olympian Dredging Company, to recover damages arising out of collision of the dredger "Thor," owned by the latter Company, with certain submerged piles in the Sacramento River, on July 13, 1918.

The libel alleged that the piles were negligently left in the river by said corporations at the time of the removal of a certain railroad bridge, in 1895. (Rec., 8.)

The District Court in a memorandum opinion (Rec., 377), held there was no liability on the part of the respondent railroad companies, and dismissed the libel. (Rec., 381.)

Upon appeal the Circuit Court of Appeals reversed the judgment of this Court and remanded the cause with instructions to determine the amount of the Dredging Company's damages upon the evidence of the case, and to enter a decree therefor. (Rec., 405, 412.)

The case is before this Court on writ of certiorari issued at the October Term, 1920. (Rec., 419.)

THE FACTS IN THE CASE.

The fundamental facts in the case are as follows:

Prior to June 11, 1895, the legislature of the State of California had authorized the construction of a railroad bridge across the Sacramento River in the vicinity of Sacramento, by the California Pacific Railroad Company, and on the date named the Secretary of War approved the plans and location of such bridge, subject to the following condition (Rec., 401):

> "2. That said Railway Company, within 90 days after the completion of the new bridge, shall remove every portion of the present existing bridge, the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of the lowest low water, being a reading of 7.5 feet on the K Street gauge, Sacramento, California."

The new bridge so authorized was completed during the latter part of the year 1895, and the old bridge (which had been constructed in 1878) was removed and destroyed during the early part of the following year. (Rec., 76, 377-8.) This was accomplished by blasting out the piles with dynamite *at or below the bed of the river.*

There is no question that the order of the Secre-

tary of War as to the depth to which the old bridge should be removed was fully complied with. In fact it appears that piles of the old bridge were removed to an even lower depth. (Rec., 84, 87, 319, 378-379.)

The District Court found that *"the longest or highest pile found in the river after the accident was upwards of 10 feet below the extreme low-water mark of 1895, when the piles were removed, and three or four feet below the point fixed by the Secretary of War."* (Rec., 380.)

The opinion of the Circuit Court of Appeals is also to the effect that the piles were cut off at or below the bottom of the river stream, as it existed in 1896, and that the order of the Secretary of War as to the removal of the piles, had been complied with. (Rec., 407.)

Subsequent to 1896, by reason of the construction by the Government of the United States, of a wing dam above the bridge site and certain dredging operations by the United States Government immediately below the bridge site, the bed of the Sacramento River at this point was gradually lowered until in July, 1918, when the dredger "Thor" suffered the injury complained of, the surface of the water was several feet lower than in 1895, *although the water in the river at this point was fully as deep in the latter year as in the former.* (Rec., 378, 407.)

As a result of these operations by the United States, the piles, which as stated, had been removed below the depth required by the Secretary of War in 1895, protruded a few feet above the bed of the river in 1918. It also appears that the course of the stream was changed in some measure, these changes, the District Court found, being caused partly by the construction of the wing dam, *"but more largely by dredging from*

the bed of the river immediately below the point of the old bridge." (Rec., 378.)

On this point the Circuit Court of Appeals also said in its opinion (Rec., 407):

> "Undoubtedly there has been a 'scouring' out of the river for many years and there was a material change in the flow at the point of the 1878 bridge, so that the extreme low-water mark as fixed by the Secretary of War in the original permit, was in 1918, approximately seven feet lower, *although the depth of the water was really not less.*"

The Circuit Court of Appeals further said (Rec., 409):

> "Respondents say that the act of the Railroad Company in leaving the piles in the river-bed was not the proximate cause of the accident, but that the construction of the jett yabove the bridge site and the dredging operations below it were the cause. *It may be granted that those two latter things had the effect of changing the channel of the river, and that as a result the level of the river was reduced.*"

It is not clear just when the wing dam was constructed. James C. Boyd, a civil engineer, called by the libelants, testified that it was constructed after the removal of the 1878 bridge in 1895-6 (Rec., 64), while Captain Demeritt said it was build "about" 1892 or 1893 (Rec., 320-1).

Another important fact, not noted by either of the lower courts, is that the work of removing the piles of the 1878 bridge was undertaken and performed by the Government itself.

It appears that, in the winter of 1895, shortly after the construction of the new bridge, the Southern Pa-

cific Company notified Captain Demeritt, who commanded the Government snag boat which was "engaged in clearing out the Sacramento River and keeping the channel free for navigation" (Rec., 83-84, 316, 324), of the existence of these piles, and that that officer thereupon proceeded with his boat and crew to the location of the piles and blasted them out. (Rec., 326.)

Captain Demeritt testified that he made a thorough job of it, blowing out the piles with dynamite placed at the bed of the river, and that the reports then made would give the number of piles removed, either by blasting or pulling. (Rec., 319, 333.) He further said that the piles when blasted would break off either a few feet below or at the bed of the river, *never above.* (Rec., 319, 327.)

Captain Demeritt further testified that it was the usual practice for the Engineer's office of the War Department, to which he belonged, to remove such obstructions to navigation, after notification of their existence. (Rec., 317, 325-6.) He said he had been continuously in charge of the Government snag boat on the Sacramento River from 1890 to 1900, and in charge of that service, but not on the boat, until 1908. (Rec., 316.)

It is true Captain Demeritt said that he directed his work principally to clearing the channel of the river as it existed in 1895, and that there might have been some piles left over on the Sacramento side of the river (on which side the accident occurred) which they did not blow out (Rec., 328-9). But this, if so, is immaterial (as both the lower courts quite evidently held), because the piles which sunk the "Thor" were afterwards found by the diver protruding through her hull (Rec., 114, 137-140, 145), and, as the District Court

found, "the longest or highest pile found in the river after the accident was upwards of 10 feet below the extreme low-water mark of 1895, when the piles were removed, and three or four feet below the point fixed by the Secretary of War" (Rec., 380).

McKeon, a witness for libelant, who said he superintended the destruction of the 1878 bridge for the Southern Pacific Company, had previously testified to the same effect, namely, that the Company had sent for the Government snag boat to blow up these piles, and that the piles had all been blown out at or below the river bed by the Government diver. (Rec., 83-85.)

The injury to the "Thor" occurred while the vessel was attempting to drift through the draw of the later bridge constructed in 1910, by which the 1895 bridge had been replaced. (Rec., 112, 31.)

It appears from the Record that at the time the accident occurred the river was abnormally low. Mr. James C. Boyd, a civil engineer called by the libelants, and who had been familiar with the river at Sacramento for over 30 years, testified that it was the lowest water he ever recalled. (Rec., 57.) Boyd said that ordinary low water was four feet, in reference to the guage at Sacramento, while on July 13th it was 1.8 feet. (Rec., 57, 59.)

It appears that the dredge was without rudder or propeller, and was maneuvered merely with its boom and bucket. The captain did not have a master's license, nor any charts of the river. The dredge just drifted around, the captain "taking a long chance" on the depth of the water and its condition. (Rec., 112, 117.) Just before it ran on the piles it got stuck a little way above the bridge. (Rec., 112.)

It does not appear that the respondent railroad

companies had any knowledge that the stub ends of some of the old piles were protruding from the bed of the river in 1918, or that they were a menace to navigation.

Neither of the respondent railroad companies was in possession of any of their railroad properties in 1918, when the accident occurred, and had no employee on the ground who could have had a knowledge of the facts. On December 28, 1917, the President of the United States had taken possession and assumed control of all of the railroads and systems of transportation of the United States, including the railroad systems and properties of your said companies, and at all times between said date and the date subsequent to the date of said accident, all of said railroad properties were under Federal control, within the meaning of the Act of Congress approved March 21, 1918, and all of said railroad properties at the time of said accident were in the possession and control of the Director General of Railroads and his employees.

ARGUMENT.

I.

The opinion of the Circuit Court of Appeals proceeds upon the theory that there was a duty upon the respondent companies, in 1895-1896, to have removed the piles of the old bridge entirely, and that it was not sufficient for them to have had such piles cut or blasted off at or below the bed of the river, at that time, although in so doing they more than complied with the order of the Secretary of War authorizing the construction of the new bridge.

The Circuit Court of Appeals ignored, or, rather, considered of no importance, the fact that the lowering of the bed of the river, which caused the piles of the 1878 bridge to protrude above its bed, was due to the action of the Federal Government itself in constructing the wing dam above the old bridge and dredging the channel of the river below it.

With regard to the effect of the construction of the wing dam just above the bridge site and the dredging operation immediately below it, the Circuit Court of Appeals said (Rec., 409-10):

> "*It may be granted that those two latter things had the effect of changing the channel of the river, and that as a result the level of the river was reduced.* But when the 1878 bridge was destroyed in 1895 the Railroad Company knew that the channel was shifting and knew that in 1893 the Government had constructed a wing dam directly by the 1878 bridge for the very purpose of throwing the current of the river and the channel from the Yolo to the Sacramento side. For years there was knowledge that the shifting current would in all probability change the channel over to where the piles were submerged in the bed, and in constructing the later bridges, the draw span was moved farther over toward the Sacramento side."

On the other hand, upon this point the District Court said (Rec., 378-379):

> "The question presented for decision, therefore, is, notwithstanding the fact that the piling or piles were removed by the railroad company in 1895, as required by the Secretary of War, and even to a lower depth, is the railway company nevertheless liable for injuries resulting 22 years

later, after the piling had been brought near the surface by the act of the Government in lowering the bed of the stream. In my opinion it is not. While the railroad company was perhaps required to take notice of ordinary changes in the course or channel of the stream from natural causes and provide against any injury that might result from such changes, it could not, in my opinion, be required to take notice of such radical changes as occurred here by the acts of the Government over which it had no control and which it had no reason to anticipate or provide against."

We submit that the District Court took a more sensible and reasonable view of the situation than the Circuit Court of Appeals. As will hereafter appear, however, from a discussion of the authorities, the suggestion of the District Court that there was any continuing obligation upon the respondent companies to take notice of even ordinary changes in the course or channel of the stream is erroneous, in view of the fact that the Secretary of War had taken jurisdiction of the matter.

It is difficult to perceive why the respondent railroad companies should have foreseen the effects of the construction of the Government wing dam, when the Secretary of War, whose business it was to attend to such matters, did not; and that neither the Secretary of War nor his engineers anticipated such a result appears from the fact that the Secretary did not even require the cutting off of the piles of the 1878 bridge at the bed of the river.

Moreover, as the District Court held, *and as the Circuit Court of Appeals concedes* (Rec., 409), the proximate cause of the injury was the lowering of the river and the changing of the channel at this point by

the dredging subsequently done by the Government immediately below the 1895 bridge. (Rec., 378.)

The Circuit Court of Appeals having concurred in the finding of the District Court that the piles were removed at the river bed, or below it, and that the order of the Secretary of War was therefore more than complied with, we assume that this court will not trouble itself on this point, in view of the well-settled rule that when two courts have reached the same conclusion on a question of fact, their findings will not be disturbed unless it is clear that their conclusion was erroneous.

Baker v. Schofield, 243 U. S. 114, and authorities cited.

La Bourgone, 210 U. S. 95, 114.

It will also be observed that both the lower courts concurred in the view that it was the action of the Government in constructing the wing dam above the bridge site, and in dredging the river immediately below caused the stumps of the piles to protrude above the bed of the river.

It is also well established that the findings by the trial judge, who heard the evidence and saw the witnesses testifying, should not be disturbed, unless clearly against the weight of the evidence, or induced by a mistaken view of the law.

Farmers State Bank v. Freeman, 249 Fed. 579, 581.

II.

At and prior to the injury complained of here, Congress had assumed jurisdiction over the navigable waters of the United States, there being in force at that time Section 7 of the Rivers and Harbors Act

of July 13, 1892 (27 Stat., 110), amending the Rivers and Harbors Act of 1890 (26 Stat. 426), so as to read as follows:

> Sec. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines, or in navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of war, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War."

This statute not only made it unlawful to construct any bridge or other structure in a navigable water of the United States without the permission of the Secretary of War, but also "*to excavate or fill, or in any manner alter or modify* the course, location or *condition* of * * * the channel of any navigable water, unless approved or authorized by the Secretary of War."

Clearly, therefore, the respondent railroad companies had no authority, under the permit issued by the Secretary of War to construct the 1895 bridge (Rec., 401-2), to do more than comply with that permit, which prescribed a specific depth to which the piers of the existing bridge should be removed, and did not require or authorize the removal of the piers altogether. To have excavated the river in order to remove the old piers or piles entirely, would have been to do an unauthorized act.

A compliance with the order of the War Department cannot be the basis of a tort, for the reason that the findings of the Secretary of War are final and conclusive as to what is and what is not an unlawful obstruction.

That the findings of the Secretary of War are final on the subject of obstructions is definitely determined by *Monongahela Bridge Co. vs. United States*, 216 U. S. 177, 195:

> "* * * Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress under the Constitution to regulate the right of navigation by all appropriate means, *to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises can not be revised or ignored by the courts or by juries.*"

See also *Union Bridge Co. vs. United States*, 204 U. S. 364.

The order of the Secretary of War fixing the depth

to which the piles should be removed, together with the fact that the 1878 bridge was originally a lawful structure, authorized the maintenance of the piles at said depth and constituted the same lawful structures regardless of any possible obstruction to navigation.

Frost vs. Washington Railroad, 96 Maine, 76.
Maine Water Co. vs. Knickerbocker Co., 99 Maine, 473.

In the Frost case a trestle had been built by the railroad company across a tidewater cove in Passamaquoddy Bay, under authority of an act of the State legislature providing that the trestle should be "so constructed as not unnecessarily to obstruct navigation"; but in view of the fact that the trestle had been approved by the Secretary of War, the Supreme Judicial Court of Maine held that it had no authority to inquire into the question whether the trestle did unnecessarily obstruct navigation.

In *Miller v. Mayor of New York*, 13 Blatchford, 469, a case concerning the Brooklyn Bridge, the United States Circuit Court said:

> "It results from the cases cited that the authority of Congress is paramount in the regulation of commerce under the Constitution, and that its determination in respect to interference with navigation by obstructions thereto is conclusive. *What it authorizes may be justified by its authority. What it forbids is necessarily unlawful.*"

As was also held by the Supreme Judicial Court of Maine in the Frost case, *supra*, the right of navigation in a tidewater channel is not an individual private property right, but a public right only, which may be abridged or extinguished by the sovereign acting for

the public, without making compensation to those who were wont to use it.

> Scranton v. Wheeler, 179 U. S. 141, and authorities there cited.

III.

The Government itself having assumed the responsibility of removing the piles (Rec., 83, 85, 316-325), the railroad companies were relieved of all further obligation in the matter, so that even if the piles were negligently removed, no responsibility would attach to them.

> The Plymouth, 225 Fed., 483.

In that case the owner of a vessel sunk in the Hudson River, who was required by the Act of Congress of March 3, 1889 (30 Stats., 1152, Sec. 15) to mark it with a buoy or beacon, applied for and secured the services of the Lighthouse Department to mark the place of the wreck. Upon this state of facts the Circuit Court of Appeals for the Second Circuit held that the owner of the vessel had fully complied with the requirements of the statute and could not be held responsible for the result of misplacing the buoy by the Department. We quote the following from the opinion of the Circuit Court of Appeals (225 Fed., 484-5):

> "It is quite obvious that if the Lighthouse Department had marked this wreck of its own motion, as it might have done, the Hartford Company could not have moved the buoy or interfered with it in any way, whether it thought it properly placed or not, and if the Hartford Company had itself buoyed the wreck the Lighthouse Department in

the exercise of its governmental authority could have changed the location of the buoy or replaced it with another. We think the Hartford Company fully complied with the requirements of the act of 1889, when it secured the services of the Lighthouse Department. No wiser or safer course could be taken than to rely upon the resources and competency of the Lighthouse Department in such case. It makes no difference in our opinion that the government made a charge for its service. It was all the same acting, not as the private agent of the Hartford Company, but in its sovereign capacity under the act of 1868, as agent for the whole public. The Hartford Company could not have ordered the buoy to be withdrawn, or have changed its location, or have controlled the Lighthouse Department in any way as a principal may control his agent.

There is no American authority on the subject, but we think The Douglas, 7 Prob. Div. 151 (1882), exactly in point. Under the Removal of Wrecks Act of 1877, the harbor master of the port of London had authority like that conferred by the act of 1868 on the Lighthouse Board. The Douglas was sunk in a collision as the result of the negligence of her master, who instructed a tug to request the harbor master to take care of the wreck. The harbor master promised to do so, but neglected to place lights for several hours, within which time the Mary Nixon, without fault on her part, ran into the wreck and sustained damage. It was held by the Court of Appeals that the master and mate of the Douglas had a right to rely upon the harbor master's doing his duty, and that the owners of the wreck were in no way responsible for the accident. Counsel seeks to distinguish this case on the ground that, unlike our act of 1899, the Removals Act does not expressly require the owner of a wreck in navigable waters to buoy her. But without any statute the law lays this ob-

ligation upon every owner who does not abandon a wrecked vessel."

In the case at bar it will be noted that Section 7 of the Rivers and Harbors Act of July 13, 1892 (27 Stat., 110), makes it unlawful "*to excavate* or fill, *or in any manner* to alter or modify the course, location, *condition* or capacity * * * of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War."

In view of this statute the respondent railroad companies had no authority to do anything more than comply with the order of the Secretary of War fixing the depth to which the piles of the 1878 bridge should be removed. It was not for them to determine what the interests of navigation required at this point, but for the Secretary of War to do so, and he had exercised his discretion in the premises. It may have been that the Secretary of War had some object in allowing stumps of the piles to remain, such as stabilizing the bed of the river at this point. When the officer in charge of the government snag boat at Sacramento went further and blew up the piles at their base, below the depth required by the Secretary of War, he was exercising an authority and discretion not conferred upon the railroad companies by the Secretary's order in regard to the removal of the piles.

The case of *Maxon et al. v. Chicago & Northwestern Railway Co.*, 122 Fed., 555, cited by the Circuit Court of Appeals in support of its conclusions, is plainly distinguishable on the ground that there the obstruction which caused the injury *was unauthorized.* In that case the railroad company had constructed a bridge across the Menominee River at Milwaukee un-

der a license from the War Department, but in constructing the bridge a quantity of stone was thrown in at the sides of the abutments as a protection from wash, some of which stone, the court found, extended into the channel and constituted an obstruction to navigation. Under these circumstances the court found that the fact the bridge structure conformed in all respects with the authority and limitations of the license of the War Deparment was immaterial. In other words, while, in that case, the abutments and other portions of the bridge were properly located, in compliance with the requirements of the War Department, the railroad company had received from the Secretary of War no authority to throw in the stone around the abutments in such a way as to obstruct the channel.

IV.

Some act of negligence on the part of the respondent railroad companies must be shown in order to justify a recovery by the libelant, and none such is shown here.

The leaving of the stumps in the river bed was not a negligent act and could have caused no injury to anyone *were it not for the unforeseen intervening acts of the Government over which the petitioners had no control whatever.* The facts here do not meet the requirements of proximate cause as defined as follows in *Milwaukee Ry. vs. Kellogg,* 94 U. S. 469, 475:

> "The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, *or was there some new and independent cause intervening between the wrong and the injury?* It is admitted

> that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury is the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances."

The intervening acts of the Government in constructing the wing dam above the site of the piles and in dredging the channel below, caused the stumps to become dangerous in a year of unprecedented low water. No one could foresee the changes thus made, in 1896.

A case very much in point is *City of Memphis v. Board of Directors of the St. Francis Levee District*, 231 Fed. 217, 222-3. In that case the District Court for the Eastern District of Arkansas, W. D., said:

> "So far as the liability of the defendant railroad companies and the bridge company is concerned, there is another ground upon which the demurrer must be sustained, regardless of the statute of limitations. The allegations of the plaintiff show that the embankments complained of were constructed by these defendants in 1891; that these embankments caused no damages to the plaintiff. It is not claimed that at the time these embankments were constructed the defendants had no right to make them, or that they negligently constructed them. It is specifically alleged in the complaint that these embankments caused no injury to the plaintiff until after the board of directors of the levee district constructed their lines of levee, and raised them to the present height, which was done in 1909. These alle-

gations clearly show that the building of the embankments by the defendant railroad companies was not the proximate cause of any damages suffered by the plaintiff, as the building of the levees was an independent and intervening cause. It is an elementary principle of law that the breach of duty upon which the action is brought must be, not only the cause, but the proximate cause, of the damage to the plaintiff, and the damage ought to have been foreseen in the light of the attending circumstances. Of the numerous authorities on that point, we refer to the following: Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474; Scheffer v. Railroad Co., 105 U. S. 249; Cole v. German Savings & Trust Society, 124 Fed. 115; American Bridge Co. v. Seeds, 144 Fed. 605, 608; Teis v. Smuggler Mining Co., 158 Fed. 260; Armour & Co. v. Harcrow, 217 Fed. 224, 227; Davidson v. Nichols, 11 Allen (Mass.), 514; McDonald v. Snelling, 14 Allen (Mass), 290; Burt v. Advertiser Newspaper Co., 154 Mass. 238; Bierer v. Hurst, 155 Pa. 523; Siewerssen v. Harris County, 41 Tex. Civ. App. 115.

Was it the duty of these defendants in 1891 to foresee that in 1909 or 1910 a levee board, not then in existence, would build such levees as is alleged in the complaint? Clearly not.

To paraphrase the language of the court in the case just cited, Was it the duty of the petitioners to foresee, in 1895-6 (what the Secretary of War and his engineers did not foresee when he issued the permit to construct the 1895 bridge and ordered the removal of the old 1878 bridge), namely, that the improvements which the Government had then made, or might thereafter make, would have the effect of lowering the bed of the stream several feet, at this point, and changing the course of the stream? It would have taken a major prophet to foretell all this.

An unforeseen intervening cause, which makes a harmless act become a harmful one, severs any causal connection between the act and the injury.

29 Cyc. 499, 500.

In *Schwartz vs. California Gas, etc., Co.*, 163 Cal., 398, 402, the Court said:

> "* * * The rule is well settled that an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause. (Chicago, etc., Ry. Co. vs. Elliott, 55 Fed. 949; Cole vs. German Savings and Loan Society, 124 Fed., 115; Western Union Tel. Co. vs. Schriver, 141 Fed. 550."

The order of the Secretary of War was more than complied with, by reason of the captain of the Government snag boat blasting off the piles at the bed of the river.

It would seem that no more than this could have been expected of any reasonably careful person (independent of the fact that the order of the Secretary of War required less); in other words, that ordinarily it would be sufficient in destroying an old bridge, to break off the piles at the bottom of the river.

This was evidently the opinion of this court in deciding *Philadelphia, Wilm. & Balt. R. R. Co. v. Philadelphia & Havre de Grace Steamboat Co.*, 23 How., 209, 217, where the court said:

> "* * * The nuisance complained of was the result of the negligence in cutting off the piles, *not at the bottom of the river*, but a few feet under the surface of the water."

And again:

> "But as the driving of the piles for the legitimate purpose of the erection was by authority of law and in pursuance of the contract, the contractors had done no wrong in placing them there. The nuisance was the result of the *negligence in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water.* This the contractors were bound to do after the piles had served their legitimate purpose in the construction of the bridge, and after they had completed their contract."

There is nothing in the record to show that conditions on the Sacramento River were such, in 1895, as to require the removal of the piles entirely. On the contrary, the evidence indicates that the removal of the piles, at that time, left the channel perfectly safe for some years and apparently until this accident happened.

The record shows, and the District Court (with both the evidence and the witnesses before it) found, that the change in the course and condition of the stream after 1895 was due partly to the construction of the wing dam above the bridge site by the Government, but *more largely* to the dredging which the Government itself did subsequent to 1895, "immediately below the point of the old bridge." (Rec., 378.)

The best and only authoritative judge of what the interests of navigation on the river required in 1895, when the order to remove the old bridge was issued, was the Secretary of War, who issued the order (through the office of the Chief of Engineers, War Department Rec., 401-2), and must be presumed to have known of the existence of the wing dam and of other

proposed operations of the Government in the river at that point, and *he* decided that the old piers should be removed only to a depth of seven feet.

The respondent railroad companies were not charged with the duty of looking after the interests of navigation at this point, and they did all that was required of them when they requested the engineer officer operating the Government snag boat to remove these piles in compliance with the Secretary's order, and saw that he undertook to comply with that order.

Under the circumstances, no negligence could be imputable to the respondent railroad companies until further alterations or modifications of the piers of the 1878 bridge were ordered by the Secretary of War and their failure to comply therewith.

V.

This court has ruled that the Government is liable for injury to private property resulting from the construction of a public improvement in a navigable water where the effect of the improvement is to alter the natural condition and flow of the water.

Lynah v. United States, 188 U. S. 445.
United States v. Cress, 243 U. S. 316.

In the Cress case the United States was held liable for damages to private lands on the Cumberland River in Kentucky, caused by the construction of a lock and dam in said river for the improvement of navigation, which resulted in the raising of the level of the river and the frequent overflow of such lands. In deciding that case the court said:

"*Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, involved the right to compensation for

land overflowed with backwater from a dam erected and maintained in the Fox River, under authority of the State of Wisconsin, for the improvement of navigation. (A permissible exercise of State power, in the absence of action by Congress, although it was an interstate navigable water. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 251; *Gilman v. Philadelphia*, 3 Wall. 713.) *The raising of the river above its natural stage, by means of an artificial structure, was the gravaman of the complaint.* * * *

"In *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, the same principle was applied in the case of an operation by the Government of the United States. For the improvement of the navigation of the Savannah River certain dams and other obstructions were placed and maintained in its bed, with the result of raising the water above its natural height and backing it up against plaintiff's embankment upon the river and interfering with the drainage of their plantation. This was held (pp. 465, 471), to be a taking of private property, requiring compensation under the 5th Amendment, notwithstanding the work was done by the government in improving the navigation of a navigable river. *The raising of the water above its natural level* was held to be an invasion of the private property *thereby flowed.*"

If the Government is liable for injury to private property occasioned by the *raising* of the natural level of a stream, it must be equally liable if the injury were occasioned by the *lowering* of the natural level of a stream, such as occurred here.

Of course, in all such cases there has to be a *taking* of private property, while in the case at bar the lowering of the level of the stream, through the operations of the Government (which the District Court found to be the principal cause for the protrusion of the

stumps of the piles of the old 1878 bridge above the bed of the river, resulting in the injury to the dredger "Thor"), involved no taking of private property, but was in the nature of a tort. The cases just mentioned are pertinent, however, for the purpose of illustrating the point that, in the case at bar, the operations of the Government were the proximate cause of the injury to the dredger, and not the failure of the railroad company to remove the piles, and that the Government alone is responsible, in law or morals, for the ensuing damage, if anybody is.

VI.

Since the Federal Government has assumed jurisdiction over all navigable waters of the United States, to the extent of regulating all bridges, piers and other obstructions to navigation, it is manifestly of the highest importance that persons operating under permits from the Secretary of War in constructing or removing such structures should be protected against liability to others when they show compliance with the requirements of the War Department, or when, as here, the War Department itself undertakes to perform the acts required.

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals should be reversed, and the judgment of the District Court dismissing the petition affirmed, with costs to the petitioners.

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Attorneys for Petitioners.

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Of Counsel.

No. 8[illegible]316 78

IN THE SUPREME COURT OF THE UNITED STATES

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Petitioners,

vs.

OLYMPIAN DREDGING COMPANY, a Corporation,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS E. HAVEN,
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MILTON T. FARMER,
Of Counsel for Respondent.

THE [illegible] COMPANY, [illegible] ST., S. F.

IN THE SUPREME COURT OF THE UNITED STATES

SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation,

Petitioners,

vs.

OLYMPIAN DREDGING COMPANY, a Corporation,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OLYMPIAN DREDGING COMPANY, a corporation, respondent named in the petition for writ of *certiorari* prayed for herein to review the decision of the United States Circuit Court of Appeals in and for the Ninth Circuit, rendered on the seventh day of February, 1921, and a decree of said court entered in pursuance thereof, respectfully presents the following brief in opposition to said petition:

I.

This suit involves an entirely private controversy and is not of such "peculiar gravity or general importance" as to merit review by *certiorari* in this Court after final judgment in the Circuit Court of Appeals.

The right of the public to navigate the Sacramento River is not infringed but expressly protected by the decree. There is, therefore, no public interest involved; nor is there any conflict of decisions which calls for construction by this Court.

The language of this Court in *Fields* vs. *U. S.*, 205 U. S. 292-296, is peculiarly appropriate to this application.

> "In this case there is no sufficient ground for a *certiorari*. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

The power of this Court to review final decrees of the Circuit Court of Appeals is exercised sparingly and with great caution and only in cases of peculiar gravity and general importance or in order to secure uniformity of decision.

American Construction Co. vs. *Jacksonville J. & T. W. R. Co.*, 148 U. S. 372-383;
Forsyth vs. *Hammond*, 166 U. S. 506-514;
Ex parte Woods, 143 U. S. 202-205.

II.

The principal contention upon which said petition is based is reliance by the petitioners upon compliance on their part with the terms of a permit granted by the Secretary of War in 1896.

The liability of petitioners, decreed by the judgment of the Circuit Court of Appeals sought to be reviewed, is based upon their negligence in partially, rather than wholly, removing certain submerged piles from the bed of the Sacramento River. These piles were the support of a railroad bridge which was abandoned in 1895-1896, when a new bridge was built in place thereof. The permit of the Secretary of War for the construction of a new bridge required the builders thereof to destroy the old bridge and remove the piles to a certain depth specified in the permit. It will be noted that the purpose of the permit was to provide for the construction of the new bridge, and that the designation of the depth to which the old piles should be removed was an incidental condition attached to the building of the new bridge.

The argument of petitioners amounts to this:

Whenever the permission of governmental authority, national, state or municipal, is obtained for the performance of any work which is subject to governmental supervision, and conditions are specified for the performance of such work, compliance by the permittee with such conditions forever discharges the person so complying from all liability to third persons for negligence in connection with the work so permitted.

Such a contention answers itself. It is forcibly disposed of by Judge Hunt in the opinion of the Circuit Court of Appeals, herein sought to be reviewed, in the following language:

> "Nor is the question of liability affected by the fact that the conditions imposed by the war department were complied with, for plainly the re-

strictions so imposed did not define the measure of liability of the railroad company to third persons rightfully navigating the river. *Maxon et al.* v. *C. & N. W. R. R. Co.*, 122 Fed. 555."

The opinion in the case cited by Judge Hunt was written by Judge Seaman of the District Court of the Eastern District of Wisconsin. The exact question now presented was there involved and received but brief consideration in the following language:

"The undoubted proof that the bridge conformed in all respects with the authority and limitations of the license from the War Department does not affect the issue."

The following cases announce the same principle:

Herrison vs. *Hughes*, 110 Fed. 550-551.

"But this court is not prepared to hold that the measure of their contractual obligation to the Government necessarily limited or defined the precise measure of their duty to third persons, whose lives and property would be exposed to extreme peril, in case of failure to indicate at night the northwesterly end of the breakwater by the maintenance of the stake-light, or some other light at that point, or by other means. They owed a duty to such third persons independently of their contractual obligations."

The Nonpareil (D. C.), 149 Fed. 521.

(*Syllabus*) "A railroad company, although having the right under state authority to erect an abutment and pier for a bridge over a public canal, if it maintains the same so as to create hidden or dangerous obstructions to navigation and to cause injury to crafts rightfully using the canal is liable for such injury."

(From the opinion) "The pier in question was

erected by authority of the general railroad law of the state and by express permission of its officers having authority in the premises. Whether such permission was properly exercised, or whether the abutment endangered safe navigation, is a proposition with which we are principally concerned. If, by erecting an abutment or series of abutments to support a bridge, the waterway or channel is made unsafe, and vessels are hindered or obstructed in their navigation, then by reason of such hindrances or interferences, if unexplained, a liability is established. Such is the holding of the cases." (Citing numerous cases.)

To the same effect are:

Great Lakes Towing Co. vs. *Kelly Island, etc., Co.*, 176 Fed. 492;
City of Milwaukee vs. *Kensington SS. Co.*, 199 Fed. 109;
Bernard & Samsel vs. *City of Philadelphia*, 212 Fed. 968;
St. Louis & St. Paul Packet Co. vs. *Keokuk and H. B. Co.*, 31 Fed. 755.

The fact that neither side to this case has been able to cite more than one case in this Court which approaches the consideration of this question is evidence either that counsel have not heretofore had the temerity to present an argument based upon such an illogical and unsound theory of the law of negligence, or that this Court has disregarded such an argument if the same has heretofore been made.

The one case above referred to was construed in the opinion of the Circuit Court of Appeals in accordance with the contention of respondent, as follows:

"*Philadelphia W. & P. R. Co.* vs. *Philadelphia & Havre de Grace St. Co.*, 64 U. S. 209, is cited

by both sides. There the piles in the channel were cut off under the surface of the water and became a hidden and dangerous nuisance as the result of negligence in cutting off the piles 'not at the bottom of the river but a few feet under the surface of the water.' We cannot draw the implication that the Supreme Court meant that if the piles had been cut off at the bottom of the river, negligence could not be inferred. On the contrary the Court said it was the duty of the Railroad Company to take care that all the obstructions to the navigation which had been placed in the channel by their orders and for the purpose of their intended erection, should be removed. Thus it seems to us was a general obligation recognized."

III.

The second contention of petitioners is a repetition of the first in a different aspect. As stated by petitioners, the argument is that compliance by them with the requirements of the Secretary of War cannot constitute negligence on their part.

This evidences an entire misconception of the basis of petitioners' liability to third persons lawfully navigating the river. That liability is founded upon their duty to remove hidden obstructions placed in the river by themselves and not upon any relations or duties arising out of governmental regulations.

It is elementary that whoever obstructs the navigation of a river is liable for damages caused thereby. This liability is a continuing one. The duty of removing such an obstruction is fully performed, and the resultant liability is fully discharged, only when the obstruction is so removed as to free the river from menace under conditions as they may then exist or

under such conditions as may reasonably be foreseen.

In this case, it was amply proven that the petitioners had knowledge of the fact that the channel of the river was shifting. In spite of that knowledge, the petitioners chose to partially, instead of completely, remove the piles. Such partial removal was negligence on their part and liability attached as soon as the remaining stubs of the piles became a menace to the nagivation of the river.

A slightly greater expense would have provided for the entire removal of these piles. The petitioners chose to save that expense and thereby assumed the liability arising therefrom.

The obstruction to navigation which caused the damage was not a "subsequent obstruction", as claimed by petitioners, but was a present and existing obstruction continuously from the time of the removal of the bridge to the date of the accident.

Nothing can be added to the forceful language of the opinion of the Circuit Court of Appeals upon this point, in which it is said:

> "When the Railroad Company built the new bridge there was an obligation upon it to remove any piling that had been used in support of the 1878 bridge and which then constituted an obstruction to navigation, or which, considering the general character of the Sacramento River and the reasonable probability that in the future its bed in that vicinity would be materially shifted would become an obstruction. We believe such a standard is correct generally, and is to be applied to the facts of the present case where the Railroad Company knew that the channel of the river was a shifting one, and with such knowledge left piles standing in the bed of the river at places

where it was reasonably probable the channel would shift. The piles could have been removed entirely, but for reasons of its own not material at all to be inquired into, the company chose to cut the piles off and to leave them submerged where under changed conditions which ought to have been anticipated and guarded against they became a positive menace to navigation. It is of course highly important that there be no unnecessary obstruction to the navigation of rivers; hence, it is a salutary rule that one who lawfully constructs a bridge across a river for railroad or business purposes, must not only not obstruct free navigation at the time of construction but must exercise diligence in guarding against dangers fairly to be anticipated. Among cases bearing upon the question we cite: *Vessel Owners Towing Co.* vs. *Wilson,* 63 Fed. 626; *N. P. R. Co.* vs. *United States,* 104 Fed. 691; *State* vs. *So. Carolina R. Co.,* S. C., 4 S. E. 796."

The continuing liability of the petitioners for their negligent act in failing to entirely remove the piles is amply sustained by the authorities of which the following are examples:

Great Lakes Towing Co. vs. *Kelley Island L. & T. Co.,* 176 Fed. 492-497.

In the above case, a city had permitted the removal of certain protection piles but no accident happened for some considerable time after the removal. It was claimed that the removal of the piles was too remote to be regarded as the cause of the accident. Upon this point, the court say:

"We are also of the opinion that the contention which the city makes that the removal of these piles was a cause of the injury too remote to subject her to liability, cannot be sustained. It is true

that the removal of the piles had already taken place, and that the accident might not have taken place but for wrongful conduct of the tug. But it is also true that if the piles had not been removed the injury to the Ohio would probably have been much less severe. They had the capacity of springs and would cushion the blow. And it is also to be observed that the negligence of the city did not cease to be operative upon the removal of the piles. It was a *continuing negligence which would become effective whenever the chance of accident should occur.*" (Italics ours.)

City of Milwaukee vs. *Kensington S. S. Co.*, 199 Fed. 109.

In this case, an abutment to a bridge was originally protected by timber which had rotted away at the time of the accident leaving a submerged stone ledge entirely unprotected. Under these circumstances, the Circuit Court of Appeals for the Seventh Circuit, speaking by Judge Sanborn, says:

"We are entirely satisfied that the decision appealed from is fully supported by the evidence, and should not be disturbed, so far as the liability of the city is concerned. The ledge was a dangerous obstruction to navigation. Easily remedied by the maintenance of piles, it was the duty of the city to put them there, *and there keep them.* (Italics ours.) Failure to do this was negligence, the proximate cause of the injury. The bridge itself was an obstruction to navigation, permitted only to serve the convenience of commerce on land. Clearly it was the duty of the city to make it as safe as was reasonably possible." (Citing authorities.)

A case somewhat analogous to the one at bar is that

of *State* vs. *South Carolina Railway Company*, 28 S. C. 23; 4 S. E. 796, the *syllabus* of which is as follows:

> "Act Leg. 1852 (12 St. at Large, p. 177) provides that it shall be lawful for the South Carolina Railway Company to construct a bridge over the Congaree river, where it is intersected by the railroad, although the bridge be not of sufficient elevation to permit steamboats to pass without lowering their smokestacks, provided that the bridge be at least 42 feet above the bed of the river. *Held, that the condition as to the height of the bridge was a continuing one, and not confined to the point of time when the bridge was constructed; and, where it appeared that the bed of the river had been slowly, but constantly, rising, so that defendant's bridge was no longer at the required height, such structure was unlawful as long as the required height above the shifting bed was not preserved.*" (Italics ours.)

The same principle has been applied by this Court in cases upholding the right of the Government to compel the changing of location and alteration of bridges when the increasing needs of navigation demand such changes, notwithstanding the fact that the bridges were originally constructed under governmental authority. These cases are reviewed in

> *Union Bridge Co.* vs. *United States*, 204 U. S. 364.

IV.

The remaining contention of petitioners is that they are freed from liability for the reason that the railroads were in governmental control at the time of the accident complained of. This is entirely immaterial

and cannot be considered on this petition for several reasons:

(a) The negligence upon which liability is founded was a continuing one from 1896 to 1918, and the cause of action is not based upon any negligence of the Director General of Railroads, but is a direct result of the act of petitioners in 1896 in leaving the menacing stubs of the piles in the river.

(b) The Act of Congress, approved March 21, 1918, called the Federal Control Act, which is relied upon by petitioners, provided in Section 10 that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers; whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law." (40 Stat. 451, C. 25. Comp. Stat. 1918, Secs. 3115¾a to 3115¾h.)

Under the above provision, suits continued to be brought against the railroads themselves until October 28, 1918, upon which latter date an order was made by the Director General of Railroads, designated as General Order No. 50, which provided that thereafter "proceedings in admiralty hereafter brought * * * based on * * * claim for * * * loss and damage to property, arising since December 31, 1917, *and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads* (italics

ours) * * * shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise." (Comp. Stat. 1918, Sec. 3115¾h.)

The above order was the only authority of law authorizing suits against the Director General of Railroads. It will be noted that it refers solely to claims growing out of the possession, use, control or operation of the railroads by the Director General of Railroads.

The claim involved in this suit did not grow out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, and is, therefore, not within the terms of the order.

> "What was authorized by this legislation to be taken under federal control was specific property —that is, solely the transportation systems of the country—and that was all the proclamations of the President assumed to take into his control. The corporations owning these properties were not taken; they were left untouched and free to continue their functions as such in all respects other than in the operation of their carrier systems."
>
> *Nash* vs. *S. P. Co.*, 260 Fed. 286.

(c) This point was not made by petitioners in the District Court nor in the Circuit Court of Appeals until the filing of the petition for rehearing in that court. Not having been raised in the Circuit Court of Appeals prior to its decree, it is not incumbent on this Court to consider the same.

Saltonstal vs. *Birtwell*, 164 U. S. 54.

Any objection which petitioners may have had as to the proper parties defendant should have been made

by motion or plea in the District Court. Failure to do so was a waiver of the objection that petitioners were not the proper parties defendant. It has so been held as to this particular law by the Supreme Court of South Carolina in the recent case of

Wyman vs. *Atlantic Coast Line Co.*, 104 S. E. Rep. 542.

For convenience of reference a copy of the decision of the Circuit Court of Appeals which is herein sought to be reviewed is added hereto as an appendix. Said decision is reported in 270 Fed. 384.

It is respectfully submitted that the petition for the issuance of a writ of *certiorari* herein should be denied.

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Of Counsel for Respondent.

APPENDIX.

Decision of Circuit Court of Appeals sought to be Reviewed.

In the United States Circuit Court of Appeals for the Ninth Circuit.

OLYMPIAN DREDGING COMPANY, a Corporation, *Appellant,* vs. SOUTHERN PACIFIC COMPANY, a Corporation, and CALIFORNIA PACIFIC RAILROAD COMPANY, a Corporation, *Appellees.*	No. 3527.

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION.

Before GILBERT, MORROW and HUNT, Circuit Judges:

Libel *in personam* against the Southern Pacific Company and California Pacific Railroad Company filed by Olympian Dredging Company to recover damages arising out of a collision of the dredger "Thor" with certain submerged piles in the Sacramento River. The allegations of the libel are that the piles were negligently left in the river by the respondents at the time of the removal of a certain railroad bridge.

The District Court dismissed the libel on the ground that there was no liability and from a decree entered in favor of the respondents appeal was taken. In brief, the evidence showed these facts:

In 1858 a wagon road bridge was built across the Sacramento River connecting the City of Sacramento with the County of Yolo in California. In 1869 the California Pacific Railroad Company, respondent, obtained a franchise to run its railroad across the 1858 bridge. In 1878 the California Pacific Railroad Company built another bridge above the 1858 bridge, and the 1858 bridge was destroyed. Later, in 1896, the 1878 bridge was destroyed. In 1895 the California Pacific Railroad Company, had permission from the War Department of the United States to build another bridge across the Sacramento River. In 1909 another bridge was built above the 1895 bridge. It will thus be observed that the 1858 and 1878 bridges were located above the present, or 1909, bridge, while the 1895 bridge was below the present bridge.

About midnight of July 13, 1918, the dredger "Thor," 120 feet long, 58 feet wide, drawing between five and six feet of water, was moving down the Sacramento River, drifting with the current, with the bow of the dredge upstream, and when about to enter the draw of the present, or 1909, bridge she struck upon one or more partially destroyed piles, and her hull was pierced and she sank in about the center of the east draw channel of the 1909 bridge. The divers said that there was a bulge about four feet square in the upper floor inside of the hull underneath the hatch; that there was also a hole with a pile sticking up on the aft end of the port side on the Yolo County side; that there was also a hole in the rake where a pile from a cluster went through; that the tops of these piles were ragged as though they had been

blasted off, not sawed off square; that some stuck up four or five feet higher than others; that they sawed off several feet of these piles in order to free the dredge. The depth of the water in the draw at the time of the collision was not less than seven feet, and according to respondent's diagram put in evidence the tallest pile of a certain cluster in the river was 4 feet 6 inches below zero on what is called the K street Sacramento guage. But it is plain that there was not sufficient clearance for the dredge when the accident occurred.

When the War Department gave a permit to the California Pacific Railroad Company to build the 1895 bridge, one of the conditions imposed was that the Railroad Company remove the piles constituting the structure of the 1878 bridge, "to a depth of seven feet below the level of the lowest low water, being a reading of 7.5 feet on the Sacramento, California, K street gauge." Accordingly some of the piles of the 1878 bridge were blown off by dynamite placed in the river bed against the piles, and some appeared to have been cut off several feet below the bed of the stream as it existed at that time. The bed of the river was lowered in 1893 by the construction of a jetty by the government on the Yolo side of the river just above the point where the accident occurred, and some dredging was done by the government at a point below the place of the accident. Undoubtedly there has been a "scouring out" of the river for many years and there was a material change in the flow at the point of the 1878 bridge, so that the extreme low water mark, as fixed by the Secretary of War in the

original permit, was, in 1918, approximately seven feet lower, although the depth of water was really not less. Obviously, under such conditions piling which had been blown or cut off in 1895 below the mark prescribed by the War Department extended much higher above the low water mark when the "Thor" was damaged.

HUNT, Judge:

When the Railroad Company built the new bridge there was an obligation upon it to remove any piling that had been used in support of the 1878 bridge and which then constituted an obstruction to navigation, or which, considering the general character of the Sacramento River, and the reasonable probability that in the future its bed in that vicinity would be materially shifted, would become an obstruction. We believe such a standard is correct generally, and is to be applied to the facts of the present case where the Railroad Company knew that the channel of the river was a shifting one, and with such knowledge left piles standing in the bed of the river at places where it was reasonably probable the channel would shift. The piles could have been removed entirely, but for reasons of its own, not material at all to be inquired into, the company chose to cut the piles off and to leave them submerged where under changed conditions, which ought to have been anticipated and guarded against, they became a positive menace to navigation. It is, of course, highly important that there be no unnecessary obstruction to the navigation of rivers; hence, it is a salutary rule that one who lawfully constructs a bridge across a river for railroad or busi-

ness purposes, must not only not obstruct free navigation at the time of construction, but must exercise diligence in guarding against dangers fairly to be anticipated. Among cases bearing upon the question we cite: *Vessel Owners Towing Co.* v. *Wilson,* 63 Fed. 626; *N. P. R. Co.* v. *United States,* 104 Fed. 691; *State* v. *So. Carolina R. Co.,* S. C., 4 S. E. 796. *Philadelphia W. & P. R. Co.* v. *Philadelphia & Havre de Grace St. Co.,* 64 U. S. 209, is cited by both sides. There the piles in the channel were cut off under the surface of the water and became a hidden and dangerous nuisance as the result of negligence in cutting off the piles "not at the bottom of the river but a few feet under the surface of the water." We cannot draw the implication that the Supreme Court meant that if the piles had been cut off at the bottom of the river, negligence could not be inferred. On the contrary, the Court said it was the duty of the Railroad Company to take care that all the obstructions to the navigation which had been placed in the channel by their orders and for the purpose of their intended erection, should be removed. Thus it seems to us was a general obligation recognized.

Respondents say that the act of the Railroad Company in leaving the piles in the river bed was not the proximate cause of the accident, but that the construction of the jetty above the bridge site and the dredging operations below it were the cause. It may be granted that those two latter things had the effect of changing the channel of the river, and that as a result the level of the river was reduced. But when the 1878 bridge was destroyed in 1895 the Railroad

Company knew that the channel was shifting and knew that in 1893 the government had constructed a wing dam directly by the 1878 bridge for the very purpose of throwing the current of the river and the channel from the Yolo to the Sacramento side. For years there was knowledge that the shifting current would in all probability change the channel over to where the piles were submerged in the bed, and in constructing the later bridges, the draw span was moved farther over toward the Sacramento side.

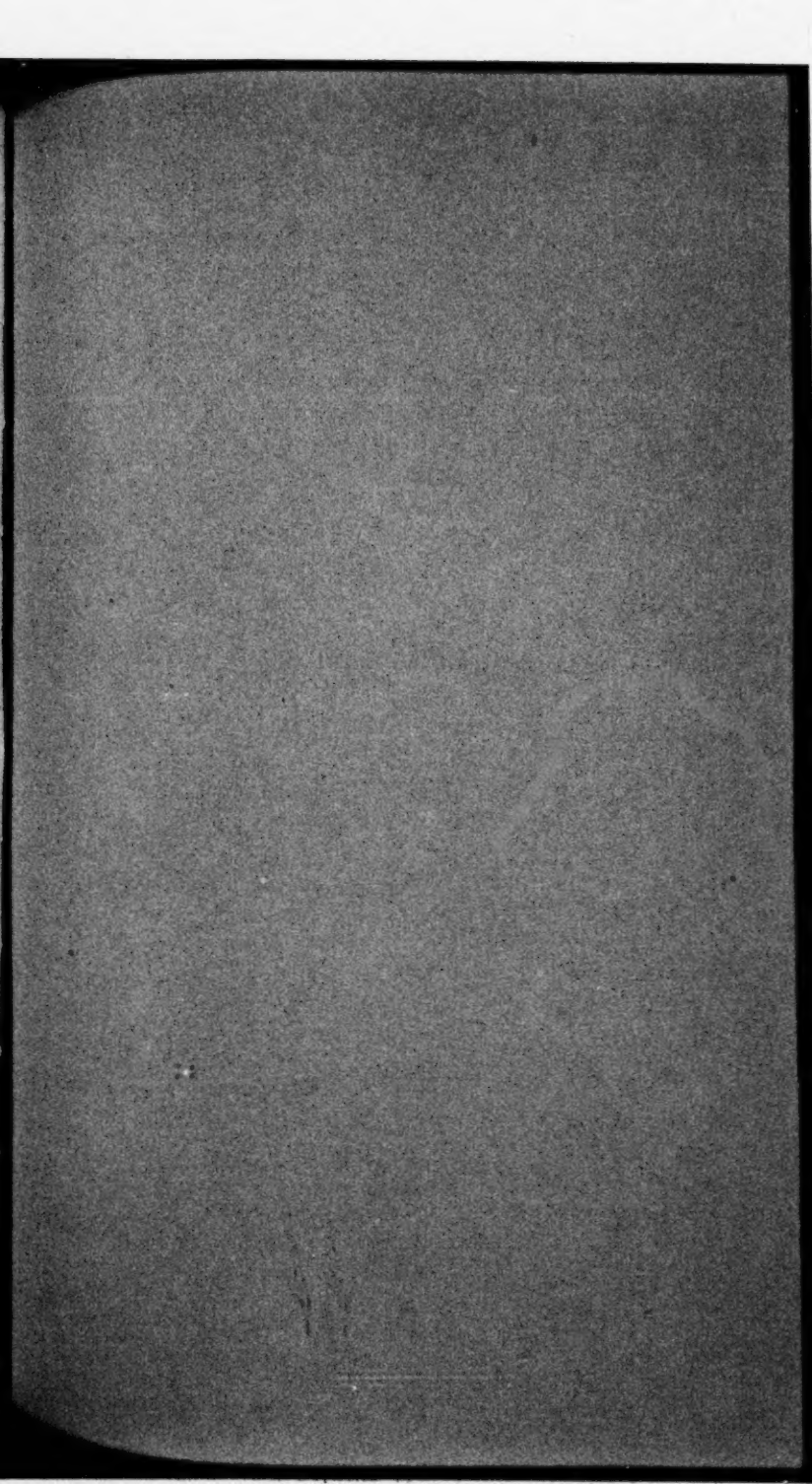
Under the circumstances and with the knowledge possessed, we think the Railroad Company cannot avoid liability upon the ground of an intervening cause. It was the failure to remove the piles left in the shifting stream that caused the damage, and the shifting of the channel so far as it became a contributing force ought reasonably to have been considered. *The Santa Rita,* 176 Fed. 890; *Vessel Owners Towing Co.* v. *Wilson,* 63 Fed. 626. Nor is the question of liability affected by the fact that the conditions imposed by the War Department were complied with, for plainly the restrictions so imposed did not define the measure of liability of the Railroad Company to third persons rightfully navigating the river. *Maxon et al.* v. *C. & N. W. R. R. Co.,* 122 Fed. 555. It is said that the liability of the Southern Pacific Company has not been established. The evidence is that the 1878 bridge was destroyed by the maintenance forces of the Southern Pacific Company, and that the permit for the construction of the 1895 bridge had been issued by the government to the California Pacific Railroad Company, it being the custom for per-

mits for bridges to issue to the corporations, not necessarily the leasing and operating company. It appeared that the Southern Pacific Company leased the California Pacific Railroad Company under an agreement dated November 1, 1886, and that the provisions of the lease made it the duty of the Southern Pacific Company to keep and maintain the property leased in good order, condition and repair and operate, maintain and add to and better the same at its own expense. If it be assumed that there was no obligation under the lease which required the Southern Pacific Company perpetually to care for property abandoned by the California Pacific Company, it is none the less true that the Southern Pacific built the 1895 bridge and destroyed the 1878 bridge, and in a practical way interpreted the provisions of the lease as requiring it not only to build the bridge that it built, but to do those things which it was under obligation to do in the way of keeping the channel free from obstructions which had been left there at the time of the construction of the 1895 bridge.

The decree dismissing the libel is reversed and the cause is remanded with directions to determine the amount of the appellant's damages upon the evidence in the case, and enter a decree therefor.

(Endorsed): Opinion filed Feb. 7, 1921.

J. D. MONCKTON,
Clerk.



Receipt of a copy of within Brief is hereby ad-
mitted this ...6th... day of May, 1921.

E J Foulds Elmer W...

.....

Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 78.

SOUTHERN PACIFIC COMPANY AND CALIFORNIA PACIFIC RAILROAD COMPANY, PETITIONERS,

vs.

OLYMPIAN DREDGING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS.

Petitioners' brief has not been served upon the attorneys for respondents at the time this brief is prepared. We are compelled, therefore, to limit this brief to a reply to the points stated in the petition for the writ of certiorari, which was issued herein.

Statement of Facts of the Case.

There is no controversy over the facts in this case. The points urged by petitioners are entirely questions of law.

The facts, so far as they are material for an understanding of the legal points involved, are so clearly and succinctly stated in the opinion of the Circuit Court of Appeals that we refrain from any attempt to repeat them here, and respectfully refer the court to that opinion, which will be found on pages 405 to 411 of the record.

Brief of Argument.

I. Compliance with the conditions annexed to the permit of the Secretary of War did not relieve petitioners from liability for damages caused by the menace to navigation which they had created.

1. The Secretary had no power to legalize such a menace.

(*a*) His only power was such as was expressly conferred upon him by acts of Congress, viz:

(1) To cause the modification or abatement of existing menaces to navigation.

(2) To regulate, by approval of plans, the method of construction of future obstructions to navigation.

(*b*) The piles which caused the damage in this case were in the river prior to the passage of the acts of Congress, above referred to. As to them the only power of the Secretary was to proceed to cause their removal. He had no power to alter the legal responsibility of the persons who placed them there.

2. The requirement that the piles be removed to a certain depth was effective only as a condition under which the new bridge might be built.

(*a*) The permit evidences no intent to fix a permanent legal status for the pile stubs.

(*b*) The continuing power of the Secretary of War to cause the removal of such a menace is inconsistent with any power or intent on his part to fix the permanent legal status of such menace.

II. Petitioners are not relieved from liability by reason of the Federal control of railroads.

1. The objection that petitioners were not the proper parties defendant was not raised in the court below and, hence, cannot be considered by the Supreme Court.

2. The submerged piles, which caused the injuries complained of, were not a part of the transportation system which was taken over by the United States Government.

3. No duty or responsibility with regard to this abandoned menace to navigation ever rested on the Director General of Railroads. "The needs of Federal operation" did not extend to these pile stubs.

4. The damages were caused by the negligence of petitioners and not by any negligence arising out of the Federal operation of the railroads.

III. Submerged hazards to navigation are maritime torts. The person responsible therefor is liable for damages caused thereby.

IV. Petitioners had notice of the constant lowering of the bed of the Sacramento River, which would inevitably cause the abandoned pile stubs to become a present menace to navigation.

V. The proximate cause of the accident was the failure of petitioners entirely to remove the piles. They are not relieved from liability by reason of any intervening cause.

VI. The obligation resting upon petitioners not to obstruct a navigable stream was a continuing one.

VII. Liability for damage caused by an obstruction to navigation does not depend upon knowledge of its danger.

ARGUMENT.

I.

PERMIT OF SECRETARY OF WAR FOR CONSTRUCTION OF NEW BRIDGE IS NO DEFENSE AGAINST LIABILITY FOR FAILURE TO COMPLETELY REMOVE THE PILES OF THE OLD BRIDGE.

Petitioners rely upon compliance by them with the conditions incorporated in the permit of the Secretary of War, for the construction of the new bridge, as a discharge from all liability for damages resulting from the partial, rather than the total, removal of the piles of the old bridge. The conditional permit so relied upon is found upon page 401 of the record in this case. For convenience of reference it is herein copied:

> "Whereas, by section 3 of an act of Congress, approved July 13, 1892, entitled 'An act making appropriation for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' it is declared that it shall not be lawful to construct by authority of the

legislative act of a State any bridge, not already authorized by law, over a navigable water of the United States, wholly within the limits of such State, without the approval by the Secretary of War of the location and plans of such bridge.

"And whereas, the California Pacific Railroad Company, having authority under an act of the legislature of the State of California to construct a bridge over Sacramento River, at Sacramento, in said State, has submitted a map of the location and plans of the same.

"Now, therefore, this is to certify that the map of location and plans of said bridge, which are hereto attached, are hereby approved by the Secretary of War, subject to the following conditions:

"1. That the Engineer Officer of the United States Army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with.

"2. That said railroad company, within ninety days after the completion of the new bridge, shall remove every portion of the present existing bridge, the old piers to be removed from the bed of the river to a depth of seven (7) feet below the level of lowest low-water, being a reading of 7.5 feet on K Street gauge, Sacramento, California.

"3. That after the present bridge is removed, said company shall furnish and place, at its own expense, immediately above and below the draw opening of the new bridge, such clusters of piles as may be required by the Secretary of War in the interests of navigation.

"Witness my hand this 11th day of June, 1895.

[SEAL.] DANIEL S. LAMONT,
Secretary of War.

(Stamped:) Office of Chief of Engineers, War Department, June 12, 1895. 10729/25.

(Endorsed:) Libellant's Exhibit No. 1. Excepting Maps, and Certificate of Secretary of War. Filed July 30, 1920. F. D. Monckton, Clerk."

Section 3 of the Act of July 13, 1892 (27 Stat. at L., p. 110, ch. 158), above referred to, was a re-enactment of section 7 of the Act of September 19, 1890 (26 Stat. at L., p. 454, ch. 907). The portion of these acts under which the permit was purported to be granted is as follows:

> "And it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, * * *: *Provided*, that this section shall not apply to any bridge, bridge draw, bridge piers, and abutments, the construction of which has been heretofore duly authorized by law."

It is to be noted that the portion of the act above quoted refers exclusively to the approval by the Secretary of War of the location and plans of bridges and other structures thereafter to be built. There is nothing in the act which purports to confer upon the Secretary of War any authority

to legalize an existing obstruction to navigation. The proviso expressly excludes any application of the act to bridges, piers, abutments, and other structures, "the construction of which has been heretofore duly authorized by law." The whole purpose of the legislation is to provide for Federal consent to obstructions over navigable streams which might thereafter be constructed.

This and other sections of the River and Harbor Bills have been construed by this court in the following cases:

Lakeshore, etc., R. R. Co. v. Ohio, 165 U. S., 365; 41 L. Ed., 747:

In that case the Supreme Court of the State of Ohio had affirmed a judgment of the trial court rendered in proceedings by *quo warranto* ordering the defendant to remove a bridge or modify its structure by creating an adequate draw span therein, the bridge being one erected and maintained over a navigable stream in the State of Ohio. It was claimed by the plaintiff in error that the courts of the State of Ohio had no jurisdiction over the matter in controversy for the reason that Congress had assumed control of all bridges over navigable streams. This contention was based upon sections 4, 5, and 7 of the River and Harbor Bill of September 19, 1890 (26 Stat. at L., p. 453, Ch. 907). Section 4 of this act confers upon the Secretary of War, authority to cause changes in construction of bridges which, in his judgment, are unreasonable obstructions to the free navigation of navigable water ways, to be made by the parties maintaining such bridges. If such changes are not made upon notice from the Secretary, he is directed to notify the United States Dis-

trict Attorney of the district in which the bridge is situated "to the end that criminal proceedings mentioned in the succeeding section may be taken."

Section 5 makes it a misdemeanor to willfully refuse to comply with the orders of the Secretary of War, given under the preceding section.

Section 7 is the same as section 3 of the Act of 1892, herein relied upon and above set forth.

This court held that "the mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named, the right to determine when and where a bridge may be built."

With reference to the seventh section of the act, with which the case at bar is particularly concerned, the language of the court is as follows:

> (P. 748.) "The language of the 7th section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge 'in any navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge * * * have been submitted to and approved by the Secretary of War,' contemplated that the function of the Secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under State authority, if its very purpose was to deny for the future all power in the States on the subject."

And the opinion concludes as follows:

> (P. 749.) "It follows, therefore, that, even conceding, *arguendo*, that the words 'navigable waters' as used in the act were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce."

While the facts of the above-cited case differ from those of the case at bar, the principle announced furnishes an answer to the claim of petitioners that compliance with the permit, here involved, legalized the stubs of the piles which petitioners allowed to remain in the bed of the river.

This action was commenced by a libel in personam against the petitioners in a court of admiralty. The jurisdiction of that court was based upon the fact that the existence of the stubs of the piles constituted a maritime tort, for which the person who placed them was liable in damages. *Philadelphia, etc., R. R. Co. v. H. Tow Boat Co.*, 23 How. (64 U. S.), 209; 16 L. Ed., 433. The jurisdiction of the court of admiralty and the liability of petitioners therein was entirely independent of any statutory provisions.

It is claimed, however, that the permit of the Secretary legalized what would have been tortious without such permit. To sustain that claim it must be shown that such was the intent of the permit and also that the Secretary was authorized so to relieve wrong-doers from the consequences of their torts, Permission, &c. Permission from a govern-

mental official for the maintenance of a menace to navigation is of no effect, unless some act of Congress has conferred authority upon him to grant such permit.

> "There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book."
>
> *Williamette Iron Bridge Co. v. Hatch*, 125 U. S., 8; 31 L. Ed., 632.
>
> *United States v. Bellingham Boom Co.*, 176 U. S., 217; 44 L. Ed., 442.

Neither the River and Harbor Bill, which was in effect at the time of the granting of the permit here involved, nor any subsequent legislation has attempted to confer upon the Secretary of War, or any other official, the right to legalize existing maritime torts. The entire purpose of the legislation is to provide "an additional and cumulative remedy to prevent such structures" across navigable waters "from interfering with commerce." This purpose is accomplished by conferring upon the Secretary of War two powers only, viz:

1. To declare existing structures illegal and to enforce their modification or abatement.

2. To supervise, by approval of plans, the construction of structures to be built subsequent to the passage of the act.

Beyond that the Secretary has no power. Any attempt on his part to legalize an existing tort is unauthorized.

In this case the consent to the construction of the new bridge was evidenced by the permit above set forth. The fact that the Secretary attached certain conditions to his approval of the plans for the new bridge was nothing more than the expression of his opinion of what the necessities of navigation required at the time the permit was granted. There can be no question that, notwithstanding the conditions of this permit, the Secretary of War could by subsequent order have required the removal of the stubs of the piles to a lower depth, and proceeded for that purpose under the provisions of Sections 4 and 5 of the River and Harbor Bill of 1890, which are quoted in the Lake Shore case, *supra*. Or after March 3, 1899, under the similar provisions of December 18, of the River and Harbor Bill of that date. 30 Stat. at L., 1121-1153, Chap. 425.

The failure of the petitioners to comply with any such subsequent notice would have constituted a misdemeanor and also rendered them liable to an action by the United States for a mandatory injunction to remove the menace to navigation. The power thus vested in the Secretary of War is a continuing one and may be exercised at such times as in his judgment the necessities of navigation require.

Union Bridge Co. v. United States, 204 U. S., 364.
Monongahela Bridge Co. v. United States, 216 U. S., 177.

The existence of this power is inconsistent with any theory that the permit established a legal depth of the piles for all time in the future, as claimed by petitioners.

In *Erie, etc., Co. v. City of Chicago,* 178 Fed., 42,

The City of Chicago built a waterworks crib in the navigable waters of Lake Michigan under a permit from the War Department, which permit, among other things, provided as one of its conditions "that suitable lights and such aids to navigation as may be required by the United States Lighthouse Establishment shall be maintained on the crib." It was proved upon the trial that no signals were prescribed by the Lighthouse Establishment, and claimed, therefore, that the structure was a lawful obstruction through the permit, and no duty rested upon the city to maintain lights, etc., until they were required by the United States Lighthouse Establishment. As to this, the court say:

> (Pp. 45, 46.) "Whatever may be the force of statute and permit by way of authority to maintain the crib, this contention is without sanction, as we believe, in any reasonable view either of the provisions referred to, or of the well-recognized paramount rights of commerce to use navigable waterways and have needful warnings to guard against obstructions placed therein.
>
> "The crib was a structure so placed for the purposes of the city, and with its creation the obligation was assumed to provide such means of warning as were well-known requirements for the protection of navigation, when darkness, fog, or thick weather prevented reasonable observation of the structure from an approaching vessel; and this with or without specific directions in the permit or elsewhere."

The contention here under discussion was disposed of in the opinion of the court below as follows (Record, p. 410):

"Nor is the question of liability affected by the fact that the conditions imposed by the War Department were complied with, for plainly the restrictions so imposed did not define the measure of liability of the railroad company to third persons rightfully navigating the river. *Maxon et al. v. C. & N. W. R. R. Co.*, 122 Fed., 555."

The opinion in the case cited by Judge Hunt was written by Judge Seaman of the District Court of the Eastern District of Wisconsin. The exact question now presented was there involved and received but brief consideration in the following language:

"The undoubted proof that the bridge conformed in all respects with the authority and limitations of the license from the War Department does not affect the issue."

The following cases announce the same principle:

Harrison v. Hughes, 110 Fed., 550-551; (Aff.) 125 Fed., 860:

"But this court is not prepared to hold that the measure of their contractual obligation to the Government necessarily limited or defined the precise measure of their duty to third persons, whose lives and property would be exposed to extreme peril, in case of failure to indicate at night the northwesterly end of the breakwater by the maintenance of the stake-light, or some other light at that point, or by other means. They owed a duty to such third persons independently of their contractual obligations."

The Nonpariel (D. C.), 149 Fed., 521:

(*Syllabus:*) "A railroad company, although having the right under State authority to erect an abut-

ment and pier for a bridge over a public canal, if it maintains the same so as to create hidden or dangerous obstructions to navigation and to cause injury to crafts rightfully using the canal is liable for such injury."

(From the opinion:) "The pier in question was erected by authority of the general railroad law of the State and by express permission of its officers having authority in the premises. Whether such permission was properly exercised, or whether the abutment endangered safe navigation, is a proposition with which we are principally concerned. If, by erecting an abutment or series of abutments to support a bridge, the waterway or channel is made unsafe, and vessels are hindered or obstructed in their navigation, then by reason of such hindrances or interferences, if unexplained, a liability is established. Such is the holding of the cases." (Citing numerous cases.)

To the same effect are:

Great Lakes Towing Co. v. Kelly Island, etc., Co., 176 Fed., 492.

City of Milwaukee v. Kensington SS. Co., 199 Fed., 109.

Bernard & Samsel v. City of Philadelphia, 212 Fed., 968.

St. Louis & St. Paul Packet Co. v. Keokuk and H. B. Co., 31 Fed., 755.

It has also been held that the liability of a contractor to third persons for damages caused by an obstruction to navigation is not measured by the terms of his contract with the government.

Consolidated Coal Co. v. Knickerbocker Steam T. Co., 200 Fed., 840:

A dredging company, under contract with the United States to dredge a channel, temporarily left the work, leaving the bottom obstructed by loose rock so as to reduce the depth of the river, without marking the place or without giving any notice of the condition to the government or to navigators. Held liable for negligence in so doing and that the provisions of their contract with the government did not measure their liability to third persons. The rule is based upon *Philadelphia, Wilmington & Baltimore R. Co. v. Philadelphia, etc., Co.*, 16 L. Ed., 433. The language of the decision on this point is as follows:

> "In *Philadelphia, Wilmington & Baltimore R. Co. v. Philadelphia, etc., Co.*, 23 How., 209; 16 L. Ed., 433, in speaking for the Supreme Court, Mr. Justice Grier said:
>
> " 'It is a rule of maritime law, from the earliest times, "that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages." '
>
> "This case arose out of damages caused by concealed piles in navigable waters. See, also, *Casement v. Brown*, 148 U. S., 615, 623; 13 Sup. Ct., 672; 37 L. Ed., 582. The duties of contractors with the Government ir this behalf are not measured by their contract; such duties to third persons are independent of their contractual relations. *Harrison v. Hughes*, 125 Fed., 860, 864; 60 C. C. A., 442; *Erie, etc., v. City of Chicago*, 178 Fed., 42; 101 C. C. A., 170. Such contractors are under the duty to mark obstructions which they are compelled to leave, and to give suitable notice. *The H. S. Nichols* (D. C.), 53 Fed., 665, 668,"

Red Star Towing & Trans. Co. v. Suare & Treist Co., 194 Fed., 672:

In this case respondent had authority to build a bridge across a navigable stream. In so doing it stored piles between high and low water, which caused injury to libelant's tug, for which respondent was held liable. Judge Noyes, speaking for the Circuit Court of Appeals for the Second Circuit, says:

> "Authority to obstruct a navigable stream by building the abutments of a bridge which can be seen and avoided, is not authority to leave such abutments when unfinished and below the surface of the water without any mark or warning. Authority to obstruct navigable waters by building a breakwater is not authority to leave the new construction without a light. *Harrison v. Hughes*, 125 Fed., 860. Authority to store piles at the side of a creek or river is not authority to allow them to remain submerged at high water without any buoy or other mark. In other words, it does not follow from the fact that the respondent was authorized to place the piles where it did, that it owed no obligation with respect to them. On the contrary it was bound to so mark them that vessels navigating the creek would not run upon them without warning; and, in our opinion, this duty was not affected in the slightest degree by the fact that the piles were placed between high and low water mark. They constituted an obstruction to vessels navigating the creek at high water and such vessels were entitled to protection."

The answer to the contention that this permit legalized the maritime tort which caused the damage in the case at bar is, therefore, twofold:

1. If the permit is to be construed as an attempt by the Secretary of War to make the existence of the stubs of the piles an authorized obstruction to navigation, such a permit is entirely beyond any power conferred upon the Secretary.

2. If it be assumed that such power existed, the permit itself cannot be so construed—

(*a*) Because it evidences no such intent.

(*b*) Because the continuing power of the Secretary of War to cause the removal of such a menace is inconsistent with any power or intent on his part to fix the permanent status of a menace of this character.

II.

PETITIONERS ARE NOT RELIEVED FROM LIABILITY BY REASON OF THE FEDERAL CONTROL OF RAILROADS.

It is claimed by respondents that at the time of the accident here involved, neither of them were in possession or in control of their properties and that the duty, if any there was, to prevent the submerged piles from becoming a menace to navigation rested upon the Director General of Railroads and not upon respondents. This contention cannot be sustained for several reasons.

First. The objection is that the suit is improperly brought against the respondents instead of against the Director General of Railroads. This objection was not made in the trial court nor in the Court of Appeals until the filing of a peti-

tion for rehearing therein and after the rendition of the decree against which the writ issued by this court is directed. This court will not consider a question of this character which was not raised in the court below prior to its decree.

First National Bank v. Commonwealth of Kentucky, 9 Wallace, 353-364; 19 L. Ed., 701-704:

"We have so often of late decided, that when a case is brought before us by writ of error to a State court, we can only consider such alleged errors as are involved in the record, and actually received the consideration of the State court, that it is only necessary to state the proposition now. As the question thus sought to be raised here was not raised in the Court of Appeals of Kentucky, we cannot consider it."

Board of Supervisors of Wood County v. Lackawanna Iron & Coal Co., 3 Otto, 619-625; 23 L. Ed., 989-991:

"It is sufficient to say upon this subject that the objection not having been made in the court below cannot be taken here. To hold otherwise would involve the exercise on our part of original instead of appellate jurisdiction. This is not permitted to us."

Lloyd v. Preston, 146 U. S., 630-645, 36 L. Ed., 1111-1118:

"As it does not appear that this matter was brought to the attention of the court below, when framing the decree, or at any time, we do not feel disposed to disturb the decree."

Morrill v. Jones, 106 U. S., 466:

> "It is a sufficient answer to this objection that no such point was made below. The court was not asked to rule on any such question. Our examination is confined to such exceptions as were taken to the rulings actually made on the trial and incorporated into the record an authenticated transcript of which is returned with our writ of error."

Objections raised for the first time upon a motion for new trial in the court below will not be considered by the Supreme Court.

Holmgrem v. United States, 217 U. S., 509; 54 L. Ed., 861-867, and cases there cited.

The raising of a Federal question for the *first time on petition for rehearing* in the State Court is too late to give United States Supreme Court jurisdiction on writ of error.

Godchaux Co. v. Estopinal, 251 U. S., 179; 64 L. Ed., 213.

Mergenthaler Lin. Co. v. Davis, 251 U. S., 256; 64 L. Ed., 255, 258.

The Judiciary Act of 1891 in authorizing the issuance of a writ of certiorari in cases of this character provides that they be certified to this court "for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." This court will, therefore, treat the case in like manner as if it were pending before it upon appeal and limit itself to the consideration of such errors as are assigned

by petitioner unless a cross writ of certiorari is applied for and allowed.

Hubbard v. Tod, 171 U. S., 474; 43 L. Ed., 246.
Montana Mining Co. v. St. Louis Mining & Milling Co., 186 U. S., 31; 46 L. Ed., 1041.
French Republic v. Saratoga Vichy Co., 191 U. S., 440; 48 L. Ed., 254.

The jurisdiction of the Supreme Court is limited to a determination of the question as to whether error was committed in the court below—manifestly that court could not have erred as to a contention which was not presented to it and upon which it did not pass.

The Supreme Court of South Carolina has passed upon the question of the proper party defendant in suits arising under the Federal control of railways and also upon the effect of the failure by the defendant to raise in the trial court the question of improper joinder of such defendant.

In the case of *Castle v. Southern Railway Co.,* decided July 15, 1919, 99 S. E., 846, it was held that such suits should be brought against the Director General and that no such action could be maintained against the railway company alone.

In the later case of *Wyman v. Atlantic Coast Line R. R. Co.,* decided July 6, 1920, 104 S. E., 542, reference is made to the Castle Case, *supra,* and attention is called to the fact that in that former case defendant moved to set aside the service of summons on the ground that the corporation was not liable. It is then pointed out that in the later case the procedure adopted in the Castle Case was not followed nor was any demurrer interposed on the ground that the allega-

tions of the complaint were not sufficient to constitute a cause of action against the defendant. It was, therefore, held that under such circumstances the defendant must be held to have waived the objection upon which it relied.

In this second case, which is on all fours with the case at bar, the judgment against the railroad company was affirmed.

SECOND. The submerged piles, which caused the injuries complained of in the case at bar, were never taken over by the United States Government, nor did any duty or responsibility with regard to this menace to navigation ever rest upon the Director General of Railroads or other United States authority. What was taken over by the Government was the transportation systems theretofore used by the companies as "common carriers."

The relations between the carriers and the public, and rights of action against the carriers, were disturbed by the war legislation only as far as was necessary for the efficient control and management of such transportation systems.

These stubs of piles constituted no part of such system and, therefore, no responsibility rested upon the Government with regard thereto.

Liability in this action is based upon negligence. Manifestly, the negligence which caused the injuries was that of the companies in leaving the piles in a dangerous condition. That liability was a continuing one and was not interrupted by any act of the Government in taking control of what was necessary for the operation of the transportation system, even if that system be considered as an entity. A different situation would have been presented if the accident from which this action arose had been caused by the

bridge which was in use as a part of the transportation system. These abandoned pile stubs were no more a part of the transportation system than an abandoned barge, ferry or railroad car in the same position would have been.

It is submitted that the views above contended for are supported by the two recent decisions of this court.

Mo. Pac. R. Co. v. Ault (June 1, 1921), U. S. Adv. Ops., 1920-22, page 647.

Western Union Telegraph Co. v. Poston (June 6, 1921), U. S. Adv. Ops., 1920-21, page 709.

The following quotations from the first of the two above cases are pertinent to the facts of the case at bar:

> "The plain purpose of the above provision (Sec. 10) was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of Federal operation."
>
> "The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President was not to be disturbed. With that exception, the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control."
>
> "The liability of the transportation system was to be enforced by allowing suit to be brought against whoever, as the party operating the same, was legally responsible under existing law, although it be the Government."

The decision of the Circuit Court of Appeals for the Eighth Circuit, in *Hines v. Dahn,* 267 Fed., 105, construed the provisions of the transportation acts in harmony with the subsequent decisions of this court. With regard to the property which was taken over by the Government, that court says (at page 109 of the opinion):

> "We do not think there can be any doubt about the meaning of the words 'railroads and systems of transportation' as used in the several acts of Congress and the proclamation of the President. In our judgment they refer only to the physical properties which constituted the system or systems. The system is composed of the roadbed, tracks, engines, cars and other appurtenances *which are used* in the transportation of passengers and freight from one place to another. The system is entirely distinct from the corporate entity which may own or manage the system." (Italics ours.)

The above case was decided and affirmed by this court (U. S. Adv. Ops., 1920-21, page 374) upon another point. It is cited here merely as a judicial interpretation of the nature of the property taken over by the Government.

Hines v. Sangstad S. S. Co., 266 Fed., 505:

This was a suit in admiralty for damages to the mast of a ship caused by the negligent handling of apparatus belonging to the Boston & Maine R. R., whose railroad properties were then under Federal control. It was held that the use of such apparatus was not a part of the operation of the railroad which was taken over by the Government.

Judge Brigham, speaking for the Circuit Court of Appeals for the First Circuit, said:

> "It (a cited case) stands clearly for the proposition that an action at law may be maintained *against a carrier* under Federal control upon a cause of action not arising against it as a *common carrier*, and that the bringing of such action is not subject to the order of the President limiting the district in which it could be commenced, because of anything contained in Section 10 of the Act of March 21, 1918."

This case follows the rule laid down by Judge Munger in the District Court of Nebraska in *Friesen v. Chi., R. I. & P. R. R. Co.*, 254 Fed., 875-878.

It is manifest that these submerged and abandoned piles formed no part of the transportation system which was taken over by the Government as they could be of no use in the conduct of the business of common carriers.

THIRD. The negligence upon which liability is founded in the case at bar is the failure entirely to remove the piles when they were originally cut off. The record contains evidence proving that these stubs of piles were left by the respondents, and further, that they had notice of the changing conditions of the river and were thereby charged with the duty of removing such menace. It was this negligence of the respondent companies and not any negligence of the agents or officials of the Government from which liability arises. Certainly no negligence can be charged to the Government unless it can be shown that some officer of the government railroad administration had notice or knowledge of the existence of this menace. No such notice or knowledge was proved.

III.

SUBMERGED HAZARDS TO NAVIGATION ARE MARITIME TORTS AND THE PERSON RESPONSIBLE THEREFOR IS LIABLE FOR DAMAGES CAUSED THEREBY.

Phila., W. & B. R. R. Co. v. Phila. & H. Towboat Co., 64 U. S., 209:

This case announced the rule that "the impinging of an anchor or other injurious impediment negligently left in the way has always been considered as one in the category of maritime torts having a remedy in the courts of admiralty." As pointed out by Judge Hunt, in his opinion in the court below, this case recognizes a general obligation on the part of railroads to take care of all the obstructions to navigation which had been placed in the channels of rivers by their orders. (Record, pp. 408-409.)

The above case has been cited and followed in a number of cases in the lower Federal courts, of which the following are examples:

North American Dredging Co. v. Pacific Mail Steamship Co., 185 Fed., 698 (Circuit Court of Appeals, 9th Circuit):

In this case the steamer "Siberia" fouled its propeller in Honolulu harbor by picking up an anchor chain attached to a buoy left there by a dredging company, which company was held liable for the resulting damage. The court says (pp. 701-702):

> "An obstruction unlawfully placed or negligently left in a navigable waterway or harbor causing injury to a vessel afloat is a maritime tort. Submerged and concealed objects capable of harming vessels are especially vexatious."

Omslaer v. Philadelphia Co., 31 Fed., 354:

A gas company having statutory permission to lay and maintain pipes across the Allegheny River was held liable for damages resulting from the fact that the pipe was laid on the bed of the river instead of being buried.

Thom v. City of South Amboy, 236 Fed., 289:

The city laid a sewer pipe on the bed of Raritan Bay about three and one-half feet distant from its pier or dock. During an unusual storm a yacht belonging to the plaintiff became wedged between the sewer and the dock and was thereby entirely destroyed. Held that the city was liable for such obstruction to navigation.

Southern Transportation Co. v. Phila., B. & W. R. R. Co., 196 Fed., 548 (affirmed 205 Fed., 732):

Respondent had the permission of Congress to erect the bridge, the abutments of which caused the injury sued upon. It was held that there would have been no liability for an ordinary collision of the vessel with the bridge itself. The court say:

> "It had the permission of Congress to erect the bridge. It was the business of the shipping to keep away from the piers and abutments of the bridge. If any vessel failed to do so it must bear its own loss."

Notwithstanding the above rule, it was further held that the owner of the bridge was liable for the reason that the collision was caused by a projecting timber about six feet below the water line; and that it made no real difference whether the timber was an essential part of the bridge construction or not.

> "In either event it was concealed. Respondent was required to take reasonable precautions to keep vessels from coming into contact with it. If unnecessary, it would have been harmless if properly protected. Was it so protected? It may be assumed without deciding that, as originally placed and planned, the fender piling was adequate for the purpose. Was it at the time of the accident?"

City of Milwaukee v. Kensington S. S. Co., 199 Fed., 109 (Circuit Court of Appeals, Seventh Circuit):

A steamer struck upon a stone abutment of a drawbridge. The abutment was protected by timbers which had rotted away at the time of the accident, leaving the stone ledge entirely unprotected, which was found by the trial court had been under water. The decision by Judge Sanborn is brief and the principal portion is as follows:

> (P. 111:) "We are entirely satisfied that the decision appealed from is fully supported by the evidence, and should not be disturbed, so far as the liability of the city is concerned. The ledge was a dangerous obstruction to navigation. Easily remedied by the maintenance of piles, it was the duty of the city to put them there, *and there keep them.* Failure to do this was negligence, the proximate cause of the injury. The bridge itself was an obstruction

to navigation, permitted only to serve the convenience of commerce on land. Clearly it was the duty of the city to make it as safe as was reasonably possible."

Thompson-Lockhart Co. v. City of Philadelphia, 212 Fed., 965 (District Court, Eastern District Pennsylvania, McPherson, Circuit Judge):

A lighter passing through the draw of a bridge owned by the city collided with projecting timber that had been part of a temporary structure, or caisson, "erected either when the pier was built or when it was repaired about 15 years ago. The caisson had not been wholly removed, and the part that remained was hidden below the surface of the water. None of it was visible at any stage of the tide, and as it was also unmarked and unprotected, it was dangerous to vessels passing through this channel even with due care."

The court say:

(P. 967:) "The collision was not due to any fault in navigation or otherwise on the part of the lighter or of the tug, but was wholly due to the fault of the city in so maintaining the pier or abutment as to be an obstruction to careful and proper navigation. The precise fault now involved is permitting the projecting timber *to remain* without proper protection by piling or other means, and without any warning of its presence, either by marking or otherwise. It is of some weight that in other narrow channels in and near Philadelphia similar piers or abutments are usually protected."

IV.

PETITIONERS HAD NOTICE OF THE CONSTANT LOWERING OF THE BED OF THE SACRAMENTO RIVER, WHICH WOULD INEVITABLY CAUSE THE ABANDONED STUBS OF THE PILES TO BECOME A MENACE TO NAVIGATION.

The knowledge of the petitioners of the change of the bed of the river is shown by the testimony of their own engineer, H. A. Luthrop. He said (Record, p. 296):

> "Our records show that the channel of the river is constantly changing and that it is, at the present time, lower than it was at that time. * * * Q. 'Isn't it a fact, also, from your records, that ever since back in the 80's, when dredging was stopped up in the placer regions of California, that the bottom of the Sacramento River at Sacramento at the site we have under consideration has been scouring down and lowering right along?' A. 'Yes, it has been lowering somewhat.'"

As to the wing dam, H. L. Demeritt, a witness for petitioners who participated in its construction, when asked as to its effect, said:

> "It scoured it out, of course, that is what we put it in for" (Record, p. 321).

This wing dam was constructed two years before the partial removal of the piles, and its construction was a matter of public notoriety.

It thus appears that the facts in the case at bar do meet the requirements of proximate cause as relied upon by petitioners and as defined in *Milwaukee R. R. v. Kellogg*, 94 U. S., 469:

> "It is generally held that, in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury is the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances."

The evidence further shows that the change in the bed of the river was caused by natural scouring more than by the wing dam and dredging relied upon by petitioners. A holding that petitioners were relieved from liability by reason of these changes in the bed of the river would mean that the liability of persons guilty of obstructing navigable waters must be determined by the conditions existing at the time of the creation of the obstruction, even if natural changes could then be foreseen which would convert a harmless obstruction into a positive menace.

V.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE FAILURE OF THE PETITIONERS ENTIRELY TO REMOVE THE PILES. THEY ARE NOT RELIEVED FROM LIABILITY BY REASON OF ANY INTERVENING CAUSE.

The opinion of Judge Hunt in the Court of Appeals on this point is unanswerable. He says (Record, p. 407):

"When the Railroad Company built the new bridge there was an obligation upon it to remove any piling that had been used in support of the 1878 bridge and which then constituted an obstruction to navigation, or which, considering the general character of the Sacramento River, and the reasonable probability that in the future its bed in that vicinity would be materially shifted, would become an obstruction. We believe such a standard is correct generally, and is to be applied to the facts of the present case where the railroad company knew that the channel of the river was a shifting one, and with such knowledge left piles standing in the bed of the river at places where it was reasonably probable the channel would shift. The piles could have been removed entirely, but for reasons of its own, not material at all to be inquired into, the company chose to cut the piles off and to leave them submerged where under changed conditions, which ought to have been anticipated and guarded against, they became a positive menace to navigation. It is, of course, highly important that there be no unnecessary obstruction to the navigation of rivers; hence, it is a salutary rule that one who lawfully constructs a bridge across a river for railroad or business purposes, must not only not obstruct free navigation at the time of construction, but must exercise diligence in guarding against dangers fairly to be anticipated. Among cases bearing upon the question we cite: *Vessel Owners Towing Co. v. Wilson,* 63 Fed., 626; *N. P. R. Co. v. United States,* 104 Fed., 691; *State v. So. Carolina R. Co.,* S. C., 4 S. E., 796."

The opinion then proceeds to show that this general obligation has been recognized by this court as follows:

> "*Philadelphia W. & P. R. Co. v. Philadelphia & Havre de Grace St. Co.*, 64 U. S., 209, is cited by both sides. There the piles in the channel were cut off under the surface of the water and became a hidden and dangerous nuisance as the result of negligence in cutting off the piles 'not at the bottom of the river but a few feet under the surface of the water.' We cannot draw the implication that the Supreme Court meant that if the piles had been cut off at the bottom of the river, negligence could not be inferred. On the contrary, the court said it was the duty of the railroad company to take care that all the obstructions to the navigation which had been placed in the channel by their orders and for the purpose of their intended erection, should be removed. Thus it seems to us was a general obligation recognized."

The contention of an intervening cause is thus disposed of (Record, p. 469):

> "Respondents say that the act of the railroad company in leaving the piles in the river bed was not the proximate cause of the accident, but that the construction of the jetty above the bridge site and the dredging operations below it were the cause. It may be granted that those two latter things had the effect of changing the channel of the river, and that as a result the level of the river was reduced. But when the 1878 bridge was destroyed in 1895 the railroad company knew that the channel was shifting and knew that in 1893 the government had constructed a wing dam directly by the 1878 bridge for the very purpose of throwing the current of the river and the channel from the Yolo to the Sacramento side. For

years there was knowledge that the shifting current would in all probability change the channel over to where the piles were submerged in the bed, and in constructing the later bridges, the draw span was moved farther over toward the Sacramento side.

"Under the circumstances and with the knowledge possessed, we think the railroad company cannot avoid liability upon the ground of an intervening cause. It was the failure to remove the piles left in the shifting stream that caused the damage, and the shifting of the channel so far as it became a contributing force ought reasonably to have been considered. *The Santa Rita,* 176 Fed., 890; *Vessel Owners Towing Co. v. Wilson,* 63 Fed., 626."

The question of proximate and intervening causes as affected by notice of change of conditions has been considered by the Circuit Courts of Appeal in the two following cases.

The Santa Rita, 176 Fed. 890 (Circuit Court of Appeals, Ninth Circuit).

In that case an oil-burning ship was held liable for damage caused by the ignition of oil which she had discharged into the Bay of San Francisco, for the reason that she was charged with knowledge of the consequences which would result from the contact of fire with the oil. The following brief extracts from the opinion are particularly applicable to the facts of this case:

"The respondent ship being an oil-burning one, was charged with knowledge of the inflammable quality of fresh oil, even on water and was also charged with knowledge of the probable effects of ordinary winds and tides in carrying the oil to where it might do great injury. The respondent cannot, there-

fore, be heard to say that she did not know fresh oil on water was inflammable, or that she had no reason to believe that the oil which she put into the harbor would be driven by the winds and tide under the dock and in among the shipping. It ought to have been known that the presence of a large quantity of fresh oil of a very combustible nature was a menace and danger while lying in an exposed position around a busy wharf. It ought reasonably to have been anticipated by those in charge of the *Santa Rita* that such a mass of oil floating under the wharf and around the shipping was likely to be ignited in some manner through the numerous and patent sources of fire which were near by. * * *

"Tried by the above rule, it appears to us that the negligent act of the *Santa Rita* in pouring oil into the bay was the proximate cause of the injury to the *Boieldieu*. The injury flowed directly from the negligent act. The result of the act is not incompatible with what one would expect. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result. * * * We are of opinion that the injury to the *Boieldieu* was the natural and probable consequence of the negligent act of the *Santa Rita*, and ought to have been anticipated in the light of the surrounding circumstances."

The same rule is announced by the Circuit Court of Appeals for the Seventh Circuit in the case of *Vessel Owners' Towing Co. v. Wilson*, 63 Fed., 626-629.

In the above case, the submerged abutments to a drawbridge were protected by piles placed six feet away from the abutment above the water. In other bridges in the same city,

the protecting piles were placed only two feet distant from the bridge. A contractor working upon the bridge, removed the protecting piles and failed to guard the submerged abutments. It was held that the submerged abutments constituted a concealed and eminently dangerous obstruction to the navigation of the river, and it became the duty of the city to guard against injury therefrom; that when the contractor removed the protecting piles, the fact that they had been placed six feet from the abutment, when it was a matter of common knowledge that usually such protecting piles are driven close to the base of the abutment, was sufficient to charge the contractor with inquiry as to the reason for the placement of the piles at the distance of six feet and the probability of there being a motive therein for the protection of navigation. The court say:

> "Naturally there was a motive for this, when it is a matter of common knowledge that such protecting spiles are driven close to the base of the abutment. The fact was sufficient to put the contractor upon inquiry, and failure to inquire, when inquiry would have disclosed the fact, was negligence."

The rule as to an intervening cause is discussed at length in the case of *Ahern v. Oregon Telephone & Telegraph Co.*, 35 Pac. 549; 24 Or. 276; 22 L. R. A. 635-640, where the court say:

> "This responsibility is based on the principle that if the defendant, instead of removing its wire, chose to hang it upon the electric pole, where it had no right to be, it was bound to look after it, and that, if the defendant had done so, it would have discovered the removal of the same, and its condition, so that

> the injury might have been avoided, and consequently that the company must be taken to have foreseen as likely to happen, or possibly to follow, the consequences which resulted from its omission to remove the wire when it was disconnected from the telephone at the Bates residence. This is in accordance with the rule that a person guilty of negligence or an omission of duty 'should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow if they had been suggested to his mind.' * * * If the intervening cause and its probable consequence be such as could reasonably have been anticipated by the original wrongdoer, the casual connection between the wrongful act and the injury is not broken, and the defendant is liable for the injury."

The rule laid down by the courts in the three opinions last above quoted fits exactly the facts in the case at bar. At the time the 1878 bridge was destroyed, the petitioners knew that the current of the river was shifting from the Yolo County side towards the Sacramento side. They were charged with knowledge of the fact that the Government had in 1893 erected a wing dam immediately adjacent to the 1878 bridge for the purpose of throwing the current of the river and the channel for navigation from the Yolo side towards the Sacramento side. They likewise knew that if the channel was changed, the piling from the 1878 bridge would eventually be in the channel. Their own witness, H. A. Lathrop, testified (Trans., p. 296), that the records of the appellees

show that the channel of the river is constantly changing and that this change was known to them. It is also clear that they were charged with knowledge of the shifting of the channel because, as each successive bridge was built by the appellee, California Pacific Railroad Company, it was compelled to move the draw span from the Yolo side towards the Sacramento side until the time when the 1910 bridge was erected, the draw span was directly down stream from the piles in question.

In the Santa Rita case, the respondent was charged with knowledge of the fact that fresh oil on water was inflammable, that the oil which she put into the harbor would likely be driven by the winds and tide under the dock and in among the shipping; that it ought to have been known that the presence of a large quantity of fresh oil of a very combustible nature was a menace and danger while lying in an exposed position around a busy wharf; that the respondent ought reasonably to have anticipated that such a mass of oil floating under the wharf and around the shipping was likely to be ignited in some manner through the numerous and patent sources of fire and that it should be charged with knowledge that it was natural for a man about the shipping to throw his lighted cigar stub into the bay or for an engineer on the wharf to dump his live coals into the water. How much more reasonable is it that the appellees in the case at bar should be charged with knowledge of the fact that the then shifting current of the river would eventually shift the channel for navigation to the point where these piles were left in the bed of the river. It is not unreasonable to say that the railroad company should have been charged with such knowledge. It was clear, and has been

for many years, that the channel of the river at Sacramento did not remain in one place but was constantly shifting towards the Sacramento shore. These facts were not only such as should have been anticipated by the appellees but were facts which they actually knew and facts which they were compelled to consider and did consider in the construction of their subsequent bridges.

The rule as laid down by Mr. Justice Miller in *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall., 44-52, requires that the intervening cause, or new force or power must be sufficient of itself to have caused the injury. In this case, the only intervening force or power was the shifting of the channel of navigation from the Yolo side to the Sacramento side of the river. This shifting of the current was not of itself a sufficient or new force which would have caused the accident in question. The only power or force which caused the accident was the piles in question so that it cannot be said that there is any intervening force whatever in this situation. The rule as set forth in the cases above quoted likewise requires that the intervening force must have been one which could not reasonably have been anticipated by the persons sought to be charged. In this case, it is clear that the only intervening force claimed by the petitioners was the shifting of the channel of the river. This shifting of the channel not only could have been reasonably anticipated by the railroad company but the testimony shows that it was actually known.

VI.

THE OBLIGATION RESTING UPON APPELLEES NOT TO OBSTRUCT A NAVIGABLE STREAM WAS A CONTINUING ONE.

It is elementary that no private interest may lawfully maintain a material obstruction to navigation. Such an obstruction constitutes a continuing nuisance from the time it becomes a menace until its removal. A breach of this obligation occurs whenever any act results in a menace. A duty rested upon petitioners to remove the obstruction caused by their piles. The performance of that duty in a partial or temporary manner relieved them from liability to the extent that the removal was effectual, and no further. Having chosen a partial remedy for a condition which they had created, they assumed the risk of its effectiveness. Their obligation was discharged only so long as the obstruction which they allowed to remain was not dangerous. The duration of their freedom from liability was measured by the time during which the remedy they adopted accomplished its purpose. The failure of the temporary expedient of partial removal marked the return of their liability. Responsibility for the obstruction was continuous from the time the piles were partially removed; liability for damage was suspended only during the time of safety; such suspension ceased when safety ended.

> *In Great Lakes Towing Co. v. Kelly Island L. & T. Co.*, 176 Fed., 492-497,

a city had permitted the removal of certain protection piles but no accident happened for some considerable time after

the removal. It was claimed that the removal of the piles was too remote to be regarded as the cause of the accident. Upon this point, the court say:

> "We are also of the opinion that the contention which the city makes that the removal of these piles was a cause of the injury too remote to subject her to liability, cannot be sustained. It is true that the removal of the piles had already taken place, and that the accident might not have taken place but for wrongful conduct of the tug. But it is also true that if the piles had not been removed the injury to the Ohio would probably have been much less severe. They had the capacity of springs and would cushion the blow. And it is also to be observed that the negligence of the city did not cease to be operative upon the removal of the piles. *It was a continuing negligence which would become effective whenever the chance of accident should occur*" (Italics ours).

A case somewhat analogous to the one at bar is that of *State v. South Carolina Railway Company*, 4 S. E., 796 (28 S. C., 23), the syllabus of which is as follows:

> "Act Leg. 1852 (12 St. at Large, p. 177) provides that it shall be lawful for the South Carolina Railway Company to construct a bridge over the Congaree River, where it is intersected by the railroad, although the bridge be not of sufficient elevation to permit steamboats to pass without lowering their smokestacks, provided that the bridge be at least 42 feet above the bed of the river. *Held, that the condition as to the height of the bridge was a continuing one, and not confined to the point of time when the bridge was constructed; and, where it appeared that*

the bed of the river had been slowly, but constantly, rising, so that defendant's bridge was no longer at the required height, such structure was unlawful as long as the required height above the shifting bed was not preserved" (italics ours).

The principle above announced is exactly applicable to the case at bar.

Some analogy may be found in those cases wherein the Government has compelled the owners of bridges to remove, alter, or destroy bridges which have been lawfully erected under permits from the State or from Congress itself, which changes were necessitated by changes either in the kind, character and quantity of the river traffic or the shifting of the waters of the stream. While it may be said that the power of Congress to compel such changes is based upon the constitutional power delegated to control commerce, the fundamental idea upon which such right is given is the protection to navigation. If Congress has the power, under the Constitution, to compel such changes without compensation, in order that navigation may be free and commerce unhindered, certainly the courts have the right to say that the change in the channel shall not relieve one who has placed in the river bed an obstruction which is likely to become a menace to navigation.

If the change in the bed of a stream authorizes the taking of property without compensation, certainly it is not unreasonable to say that the change of a stream would render a party liable for any nuisance for the creation of which he was originally responsible.

The Supreme Court has passed upon the question of the right of the Government to compel the changing and alteration of bridges many times, and those holdings are best

summed up in the suit of *Union Bridge Company v. U. S.*, 204 U. S., 364; 51 Law. Ed., 523.

In

Northern Pacific Railway Company v. United States, 104 Fed., 691,

the United States brought suit to enjoin the railway company from creating an obstruction in the channel of the Red River of the North. This obstruction was created by the erection of a high embankment over which the tracks of the railway company were to be laid and trains operated. The additional weight on soil adjacent to the bank of the river by reason of a peculiar substructure of clay forced the stratum of clay out into the bed of the river and created the obstruction complained of. The railroad was erected under authority of Congress; but the existence of the clay stratum was unknown both to Congress and the railroad company until after the track was actually constructed.

The situation in the case at bar is much stronger because the appellees knew that the channel of the river was shifting and they likewise knew that they had left the piles in the bed of the river at a place to which the channel would in all probability shift. If they had wanted to relieve themselves of such a contingency as has actually arisen in this case, it was their duty to entirely remove the piles from the bed of the river and thus absolve themselves from responsibility for any contingency liable to arise. Having elected to remove the piles to the level of the then existing bed of the river, which was undoubtedly a much less laborious and expensive operation than to have removed the piles entirely, they are bound to be responsible for the consequences arising from such election and cannot absolve themselves from liability

because of the change in the channel, which change they should have foreseen.

In the case last cited, the railway company was charged with creating a nuisance, under conditions of which they knew nothing. Is it not more reasonable to say that the respondents in this case should be charged with creating and maintaining a nuisance arising out of changed conditions of which they are charged with notice?

The principle underlying the doctrine here contended for is the same as has been applied by the courts in holding officials charged with the duty of maintaining bridges liable for damages suffered from the use of the bridge in a method entirely different from the ordinary and usual travel at the time the bridge was built, but not different from such travel at the time of the accident. In many of these cases, the accidents causing the injuries have resulted from the use of bridges for the transportation of traction engines and other forms of machinery which were entirely unknown at the time the bridge was originally constructed. In such cases, the law has been repeatedly established to the effect that persons charged with the duty of maintaining bridges are responsible for their failure to sustain weights which were not in contemplation at the times the structures were built. In other words, it has been determined that there is a continuing liability resting upon the custodians of bridges to accommodate such new needs of transportation as may come into use by reason of the development of industry and invention. The cases on this subject are many of them cited and discussed in the two cases of

Gehringer v. County of Lehigh, 231 Pa., 497; 80 Alt., 987; 35 L. R. A., N. S., 1127.

Kovarik v. Saline County, 86 Neb., 440; 125 N. W., 1082; 136 Am. S. R., 704; 27 L. R. A., N. S., 832.

In the first case above cited, the exact question presented for decision is shown by the contention of the defendant and appellant as stated in the following quotations from the opinion:

> "The principal question involved is stated by appellant as follows: 'Is a county liable for damages suffered through a failure of the part of the floor system of one of its bridges while there was being taken across it a load which, in respect of weight and otherwise, was different in character from the ordinary and usual travel over the highway in the locality of the bridge at the time it was built, but not different from such travel at the time of the accident, if the county commissioners properly maintained the bridge in accordance with its original design and plan of construction?' * * *
>
> "The defendant contended that if, at the time the bridge was built, it was sufficiently strong to care for the then ordinary and usual travel over the highways in that locality, and if the county had maintained the structure in good condition according to its original carrying capacity and construction, the commissioners had performed their full duty; further, that, if the weight of a motor truck and its contents was greater than the load usually and ordinarily transported over the highways in the vicinity at the time the bridge was built, though not greater than the usual and ordinary loads at the time of the accident, the failure of the commissioners to strengthen the bridge in order to take care of such greater loads would not be negligence. But the trial judge refused so to charge."

The ruling of the trial judge was affirmed upon appeal, the court holding that the obligation rested upon the commis-

sioners to constantly maintain the safety of the bridge as required by the changing conditions of traffic.

In the second case above cited, the judge of the trial court instructed the jury as follows:

> "Nor are counties bound, when constructing bridges, to anticipate uses not then known and existing, which are not within the ordinary experience at the time of the building of the bridge. So, in repairing said bridges, the counties have performed their whole legal duty when they have put them in as good condition of strength and soundness as will make them as secure as new bridges of the same kind and plan."

This instruction was held to be erroneous, the court saying:

> "There can be no reasonable doubt but that the obligation of a county in connection with its bridges is a continuing and, in some degree, a shifting one."

Quotation is then made from the syllabus of an earlier Nebraska case as follows:

> "In constructing and maintaining a bridge for public use, a municipality is not limited in its duty by the ordinary business use of the structure, but is required to provide for what may be fairly anticipated for the proper accommodation of the public at large in the various occupations which, from time to time, may be pursued in the locality where it is situated."

If the duty of providing for safety of transportation over bridges requires an anticipation of future needs, we can see no reason why the obligation not to interfere with the safety of transportation by water is not likewise a continuing duty.

VII.

LIABILITY FOR DAMAGE CAUSED BY AN OBSTRUCTION TO NAVIGATION DOES NOT DEPEND UPON KNOWLEDGE OF ITS DANGER.

It has been shown in the preceding portions of this brief that the petitioners were charged with and had actual knowledge of the shifting of the channel of the Sacramento River and of the danger to navigation from the stubs of the piles which they left in the river. Such knowledge on their part is not, however, a necessary element of their liability. Any one who obstructs the free navigation of a river is liable for the resulting damage independently of his knowledge of the danger created by such obstruction. Responsibility for a tortious act is not measured by the realization of the danger resulting from the tort. Even if the appellees had believed that no possible damage could result from the submerged piles, their liability would not have been lessened.

In *Vessel Owners' Towing Co. v. Wilson*, 63 Fed., 626-629, the Court of Appeals of the Seventh Circuit says:

> "The law cannot permit one to uncover a concealed and dangerous obstruction to navigation, and to plead in excuse ignorance of the character of the obstruction. He must act at his peril. Acting under the authority of the city that created the obstruction, and bound by the contract to protect the city, and bound by law to keep free and unobstructed the channel of the river, if, in the prosecution of the work, it became necessary to remove protection works that had been maintained by the city, and that guarded the navigation of the river, the contractor could not shut

his eyes to the character of the obstruction that had so been covered, or negligently remain ignorant of its character."

In *City of Milwaukee v. Kensington S. S. Co.*, 199 Fed., 109-111, it is said:

> "The ledge was a dangerous obstruction to navigation. Easily remedied by the maintenance of piles, it was the duty of the city to put them there, and there keep them. Failure to do this was negligence, the proximate cause of the injury. The bridge itself was an obstruction to navigation, permitted only to serve the convenience of commerce on land. Clearly it was the duty of the city to make it as safe as was reasonably possible."

We respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

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